

T H E
WHOLE PROCEEDINGS,
IN SEVERAL INFORMATIONS
IN THE NATURE OF A
QUO WARRANTO,
THE KING,

ON THE
PROSECUTION OF JAMES TEMPLAR, Esq.
HIS MAJESTY'S CORONER,

AGAINST
MR. THOMAS AMERY,
ONE OF THE TWENTY-FOUR ALDERMEN,

AND
MR. JOHN MONK,
ONE OF THE FORTY COMMON-COUNCIL-MEN,

OF THE
CITY OF CHESTER,
ON THE RELATION OF RALPH EDDOWES,
OF THE SAID CITY, MERCHANT.

VOL. II.

CONTAINING THE
ARGUMENTS OF COUNSEL,

AND THE
JUDGMENTS

OF THE
COURT OF KING'S-BENCH AND THE HOUSE OF LORDS,
IN THE SAID CAUSE.

..... Tum, livore sepulto,
Si quid meremur, sana posteritas sciet.

MILTON.

Chester,

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1791.

[KING'S BENCH.]

In Easter Term, 1787, Mr. Bower moved for, and obtained, a rule to shew cause why the *posse* should not be delivered to the defendant, in order that he might enter up his judgment on it, and that in the mean time it might remain in the associate's hands.

On shewing cause, the ensuing term, the argument proceeded as follows.

JUNE 18.

Mr. SERJEANT ADAIR.

May it please your lordships :

UPON this record, and the finding of the jury on the several issues, it is incumbent on me to prove to your lordships, that the charter of Charles II. at the time of the election of Mr. Amery, was not the subsisting charter by which the corporation of Chester was regulated ; but that under all the circumstances in which it then stood, the charter, if it ever had any legal force or effect at all, was completely done away, the corporation remaining *de jure* under the government of the charter which it possessed prior to the proceedings upon the information in quo warranto.

I contend, that the effect of those proceedings upon the corporation of Chester, as it stood at the time when that information was filed, was not such as could empower the crown to grant the charter of the 37th Charles II. for at that time, notwithstanding any thing in those proceedings, or that is at all stated upon this record, there was a subsisting corporation in the city of Chester, entitled to all their antient rights and privileges ; those rights being only *suspended* by the judgment *quousque*, which was merely in the nature of a process to compel appearance.

It will be material to consider whether in any way the rights of a corporation may be taken away, or whether a corporation may be dissolved. I shall certainly contend, that a corporation, once duly and legally existing, cannot be dissolved, either by their own act, by the act of the crown, or by any judgment whatever in a court of law.

I state the proposition in its full extent ; and I do not state it rashly ; but I come prepared with authorities, in support of it, of considerable weight, which will certainly deserve, at least, the serious *attention* of the court. It is necessary, however, to explain what I mean by the word *dissolved* : by the word *dissolved* I mean, *an entire destruction and annihilation of the corporate capacity*.

I assert, then, in the first place, that a corporation cannot surrender up, and part with, its corporate capacity and existence.

And upon that, as being the strongest point, and upon the face of it the most difficult to maintain, it seems to me, that I have been able to collect the strongest authorities.

The first that is to be met with is an authority of great weight. It is the case of the dean and chapter of *Norwich*, in 3 *Coke*, 76 b.—and the same case is reported in 2 *And.* 120 ; in which it is clearly held, by the lord keeper and the three chiefs, to whom the question was referred, that the old corporation of the dean and chapter of *Norwich* did still remain, notwithstanding the surrender of their church and of all their possessions.

Your lordships will find that the surrender in question, which was the subject matter of this determination, was really in much larger terms than are stated in Lord *Coke's Reports* : it is more fully stated in a case I shall mention to your lordships ; for the terms made use of in Lord *Coke's Reports*, and in those of *Anderson*, imply only a surrender of the *church* and of the *possessions* of the dean and chapter ; but I shall shew clearly, that the surrender extended to *all rights, franchises and privileges whatever*, claimed by the dean and chapter of *Norwich*. The same point is held in 2 *And.* 165, in an anonymous case, in which the same proposition is there supported.

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In the case of *Hayward versus Fulcher*, which is reported at large in *Palm.* 491, and *Sir W. Jones*, 166, the surrender of the dean and chapter is stated, in terms, upon the record, by the special verdict; namely, that they had granted, by deed enrolled in Chancery, to King Edward VI. "the cathedral church, and all their possessions, rights, liberties, privileges, and hereditaments." It was not easy to find larger words: they were used in the most solemn instrument of surrender that could be made, and *that* duly enrolled. There follow words still more material:—"all the rights, liberties, privileges, and hereditaments, which they had in right of their corporation." Subsequent to this surrender, it is also stated, in the special verdict, "that King Edward VI. granted a new charter of incorporation to the church, by the old name of the church of the holy and undivided Trinity of Norwich, with the addition of these words, *Ex fundatione Regis Edw. VI.*" Upon the special verdict it became a material question, *which* of these corporations subsisted; the *old* corporation of the dean and chapter, which had surrendered, as far as in them lay, all their rights and privileges which they held in right of their corporation, or the *new* one of the 2d Edward VI. The four judges of the court of King's-bench (in which court that special verdict was argued) unanimously held, that the old corporation was not extinct; and farther, that the new charter of incorporation was void. Therefore that authority states these two propositions:—

First, That by that solemn surrender of all their rights and privileges which they claimed as a corporation, their corporate capacity *was not destroyed*. And it states *another* proposition, to which it will be material for me to call the attention of the court, in another part of my argument, viz. That the *new charter* of incorporation, granted by Edward VI. upon the supposition that such a corporation did not exist, *was absolutely void*.

And it will be difficult for my learned friends, when they come to support this rule, to shew by what means it can be contended, that the new charter of incorporation of Charles, granted to the citizens and inhabitants of Chester, as having no corporate capacity at all, and upon a supposition that no corporation then existed, is not void, when it is expressly held, in the case I have stated, that a new charter of incorporation of Edward VI. granted to the dean and chapter, by partly their old description, with a small addition of a new one, is void, because their old corporate capacity was not destroyed by their own surrender.

This question of a surrender of a corporate capacity, by a corporation itself, occurred again in a more modern case, the *King v. Grey*, respecting the corporation of Colchester, reported 8 *Mod.* 358. The book states, that in that case the chief question was, whether, by a surrender of their charter by the corporation of Colchester, made in the 36th Charles II. (one of those famous surrenders obtained by the crown in a manner subversive of the rights and privileges of all the corporations in the kingdom) the corporation was wholly dissolved; for if it was, then the charter of King William, by which the lands and privileges were regranted, was void, because it was to a corporation not in being.

Your lordships see that the question was considered *reverso intuitu* from that in which it was considered in the case of *Fulcher v. Hayward*. In the case of *Fulcher v. Hayward* it was considered, whether the old corporation was or not dissolved, in order to judge whether a charter, which supposed them to be non-existent, was a good charter or not; and there it was held, that a subsequent charter, granted upon such a supposition, was void, because the old corporation was existing. In the case I am now stating, the converse of the proposition was taken; for the question *there* was, whether a charter, granted upon the supposition that the old corporation existed, was good or not? which depended upon the same preliminary question, whether the old corporation was or not dissolved? There, as to the chief point, whether the very being of the corporation was destroyed by this surrender? three of the judges held that it *was not*; and compared it to the surrender of a deed, that the estate was not thereby surrendered. Therefore the corporation was still subsisting, and had a capacity to take, and by the charter of King William did retake, and

and that they could not give up more by a surrender, than they could take by a re-grant.

In the great case of the city of London, several learned men were of opinion, that a surrender did not destroy the being of a corporation. This appears by the surrender of the abbeys, in the reign of Henry VIII. for it was not thought proper, at that time, to rest purely on those surrenders, but to have them confirmed by act of parliament. And what is last mentioned in the case of the *King v. Grey*, is a powerful authority in support of the doctrine I am now contending for; for after the surrenders that had been procured by the king of the different possessions, and of the very existence of the monasteries and religious houses, in the kingdom, it was, as the book observes, not thought fit to rest upon the legality of these surrenders to the crown, but to confirm them by act of parliament, which would put them out of doubt.

In the same case, in the argument of Sir George Treby, (p. 10.) who was then recorder of London, another authority is cited to this point, which is a material one, and which in truth is of the same nature with that last mentioned in the conclusion of the case of the *King v. Grey*. He says, "the 32d Hen. VIII. cap. 24, relates to the corporation of the knights of St. John at Jerusalem; and it seems, by the penning of that statute, that this very question (being the question of the power of a corporation to surrender its corporate capacity, and annihilate itself) had been taken notice of since the time of the making of the last statute in the 30th Hen. VIII. for there it is declared, that the corporation of St. John at Jerusalem shall be dissolved, and that the king shall have their lands; so that their taking notice of, and providing directly to dissolve it, shews, that they had by that time considered, that neither the surrender of their lands, nor the vesting of them in the king, had done any thing to the corporation, save only that they have deserted their house, and fancied themselves dissolved, because they were turned out of their possessions."

There are only two cases to be found in the books, as far as I have been able to make any search, that look the other way; and I may say so, with the greater confidence, because at the time of the informations in quo warranto the most diligent inquiries were made, by all the first lawyers in the kingdom, on the one side and the other; at that time, therefore, I conclude there existed no other authority, nor at the time of the Revolution; and I am not aware that any authority can be derived from any modern decision: if it can, your lordships will hear it from the other side. The two cases I refer to, are in *Dyer*, 273 and 282. To those there is a very full answer given by Sir George Treby, in the argument I have been speaking of, (p. 11.) and it is a better answer, and better expressed, than any I can state. I will trouble the court with reading that answer, which is not very long.

"There is a case in *Dyer*, 282 (and it is the only case that seems against us in this point; for that in 273, the book itself states, was by authority of parliament.) There were two deans and chapters of St. Patrick and Christ-church, Dublin, in Ireland; and these both, and not one, of them, were together one chapter of the archbishop of Dublin, time out of mind; and one of these surrendered, and then their house was used for a place for the courts of justice, and continued so; and then a lease is made by the bishop, and that confirmed by the only remaining dean and chapter, which was that of Christ church; and whether that lease was good or no, was the question: and truly that was the only question that is made there, in that book, and so it is of little authority as to any thing else; but it is true that the book does say, in the end of the case, that the lease was held good, *Quid corporatio et capitulum sancti patricii prædicti fuit per donum et sursum redditionem decani et capituli prædicti legitime dissolutum et determinatum*. To that I answer,

"First, There was no occasion for this reason, because it did digress from the main point in the case, as is truly observed in Palmer, 502.

"Secondly, It was a private, extra-judicial opinion; it was the opinion of but five judges."—It is necessary here to recall to your lordships' attention, that this was a case stated privately to the judges, like the cases that are every term determined in

Serjeants-

Serjeants-inn, without argument, and extra-judicial. He says, "It was the opinion of but five judges; and for aught appears, seven might be of another opinion; and yet the case was sent for the opinion of all the judges here, because the lawyers in Ireland, it seems, did make a great doubt of it; and it was also an opinion and judgment on the favourable side, for it was to confirm a predecessor's lease. But,

"Thirdly, Certainly the case is mistaken; for the surrender could not be good, without the consent of the bishop, which is also added in the end of the case there. He is the patron, and must necessarily confirm their acts, to make them valid; especially they being instituted, and given to him for his advice, in the government of the church, and the disposal of its lands.

"Fourthly, I have this further answer to give it, that my Lord Coke says, in *1 Leonard*, 234, (and it is not denied) that this surrender was by act of parliament, or else it had not been good: and beyond that,

"Fifthly, I have by me a manuscript of my Lord Dyer's Reports, the most authentic one, which was my Lord Coke's, and has his own hand to it in sundry places." And this is very remarkable indeed, because it gives strong reason to believe that there is no such authority as that which is contended for in Dyer. Sir George Treby says, "that Lord Coke does often correct the prints of Dyer, and so also he might have done in this case, for there all these Latin words are left out; there is not one of them, nor any space left to put them in, nor any blot for their being erased: it is an addition of the publisher, and printed in another letter than the rest of the case is. It is not in that book which I take to be the truest original of Dyer. Besides, my Lord Coke's answer that it was by act of parliament, makes an end of all."

I therefore contend, that, by a number of cases which I might adduce from books of the highest authority that are to be met with, and which it would be tedious to state to the court, it appears, that even by their own voluntary act, and by the most solemn grant, surrendered and enrolled in Chancery, a corporation cannot destroy its own corporate existence; and that there is not, when it comes to be explained, one single authority to be found in the books to the contrary.

Upon the second point, that the king cannot by his prerogative destroy or dissolve a corporation, it is unnecessary to trouble your lordships with many authorities; for at this day, I shall scarce expect to hear that proposition seriously denied. The proposition is thus laid down in express terms: the King can create, can grant a corporation, yet he cannot dissolve it, *Palm.* 501, and *Bro. tit. Corporation*, pl. 78. And it is farther stated, that the king not only cannot dissolve a corporation, but that he cannot take away any of the antient rights and privileges of a corporation. That is also laid down expressly in 3 *Burr.* 1656, in the case of the *King v. the Vice Chancellor of Cambridge*; where it is stated, that the crown cannot take away from corporations any rights that have been formerly subsisting in them, under old charters, or prescriptive usage. As I do not expect the converse of that proposition will be contended for now, I shall not trouble your lordships further upon that part of the case.

The most material point of all which I have undertaken to maintain, is, that a corporation cannot be annihilated by the judgment of his majesty's courts of law; and upon that, I think, there are many and great authorities to be found; though I admit, that a difference of opinion is to be met with in some few instances in the books; but in every instance, where a contrary opinion is hinted at or insinuated, it has always been against the opinion of the majority of the judges before whom the point was then under discussion; and it has not, that I can find—I believe, indeed, I may venture to assert, that it *never* has been confirmed by any judicial opinion.

It is an argument always admitted in the courts of law, that that which never has been done (where the case is of a kind that is in frequent practice) cannot by law be done. That has been a reason frequently given by judges, against maintaining actions novel in their kind; and that reason certainly applies with the greater force where it respects the exertion of a prerogative of the crown; for if a prerogative of
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the crown has never been exerted, it is a pretty strong negative argument against the existence of such a prerogative. The courts have, in various reigns, been acting upon different principles, and some very arbitrary ones. If the assistance of the court has never been called in to support the prerogative of the crown in this instance, it is a strong argument indeed to shew, that the judgment of the court cannot have any such effect. That it has never been done prior to the informations in the reign of Charles II. I possess the strongest authority for. The industry of the crown lawyers at that time (which was not a little, and which was exerted upon a point that was of all others the most important to the views of the then government) had not been able to find any such case. On the contrary, I have a direct admission that their search on that head had been ineffectual; and that is to be met with in Mr. Solicitor General Finch's argument in the case of the London quo warranto, in the fourteenth page; in which, when he is stating judgments of ouster, that had been given to oust corporations of particular franchises, (which I admit may be done) he expressly says, "that he has not been able to find an instance of a judgment of ouster against the franchise of being a corporation itself." After giving some instances of ouster of particular franchises, he states a case in 9 Edward I.—there it appears that the judgment was given *by parliament*, that the liberty should be *forfeited*, not that it should be *seized* into the king's hands only.

And it is observable there, that the solicitor-general thinks it necessary to remark, that it was *by act of parliament*. He is very earnest to contend that this *may* be done; and therefore his admission, that it never has been done, I trust, will have additional weight. "Where all the franchises of a corporation are forfeited, what is the corporation (says he)? truly it is nothing; it is but a name. A corporation without a power to act is nothing at all. Indeed, *I do not find any judgment in a quo warranto of a corporation being forfeited*; yet it doth not follow from thence, that this cannot be by law." It was necessary for *him* so to contend; but what I cite it for now, is to shew, that the industry of the lawyers of that period had not been able to find any such instance; and therefore it will be presumed by your Lordships, that there never was one.

It is remarkable, that in looking through the arguments in the case of the quo warranto against the city of London, where this point is more learnedly and fully discussed than in any other book, I shall have occasion to cite considerably more from the argument of the crown lawyers, than from the argument of the learned lawyers who supported the rights of the city of London; and I rather chuse to do it, because coming from that quarter, upon this occasion, it will certainly have additional weight.

Sir Robert Sawyer states very distinctly, and, as it appears to me, with great accuracy, and like an able lawyer, the different judgments that ought to be given upon informations in quo warranto; and nothing can be more material to this point than the doctrine he there lays down, supported by a very diligent research into antient records and authorities. Speaking of a judgment of Ouster, in the 16th page of his argument, he says, "This court is to set the fine upon the *capiat*, but not the fine for redemption; *that* is purely in the king's breast, and *ex gratia regis*, there is no such formal judgment of seizure until fine; but this upon judgment, and another seizure upon inquisition or presentment which I shall mention, are the seizures in the king's right presented in Mortimer's case; but frequently entered *quousque dominus Rex aliud perciperit*. What was intended by a judgment of ouster in that book, and in what cases by the course of the king's courts it ought to be, will best appear by an antient rule taken and agreed by the judges in Edward the fourth's time, before they were promiscuously used.

"The rule is this: Where it clearly appears to the court that a liberty is usurped by wrong, and upon no title, either by the king's grant or otherwise, there judgment only of ouster shall be entered; but where it appears that the king, or his ancestors, have once granted a liberty, and the liberty be misused, judgment of seizure into the king's hands shall be given. These rules carry their own

"light with them; that which came out of the king's hands (as Bracton useth the word) is properly returned there again by seizer; or, as our ancient books phrase it, by re-seizer; but that which never came thence, but is merely usurped upon him, shall be vacated, and by judgment of law declared null and void."

"There is another case which is there likewise resolved, and that is, where it is doubtful to the court, whether the liberty commenced by grant, or by wrong, that, for the uncertainty, the best and safest course is, that judgment be given of seizure."

"This last case was the principal case in that book; the question arising, upon a default, what judgment should be given, and by that rule judgment was given of seizure, not of ouster; and agreeable to these rules all the judgments I have met with have been given, and this course hath been found most beneficial to the subject, who, though by forfeiture, mispleading, or default, he may lose his liberty, may have recourse to the king's mercy for restitution."

"In the case of the bailiffs and aldermen of *New Radnor*, which was by default, judgment of seizure was only given."

"In the case of *New Malton*, though the issue that the corporation was by prescription, was tried against them, yet having long acted as a corporation, and might have mispleaded their title, as the city of London hath done, in claiming that by prescription which commenced by grant within time of memory, judgment only of seizure was given, and not of ouster."

From what I have now been stating, this appears clearly to have been the doctrine of the crown lawyers at the period I am speaking of, and founded upon the most diligent search and investigation of the subject, that wherever a corporation hath once had a legal existence, that legal existence could not be destroyed by judgment of ouster: in truth, that judgment of ouster, as to the corporate capacity, could not be given. And it is expressly stated by Sir Robert Sawyer, that all the cases have been conformable to that rule, and that judgment of ouster shall only be given in the case where to be sure it is proper; where there never has been any right at all; where in contemplation of law no corporation has, in fact, existed, *there* the persons who claim that which never had a legal existence, shall be totally put out; shall be removed from that usurpation, because the corporation never had a legal existence: but where the corporation ever had, at any period, a legal existence, the persons possessed of that, shall not be liable to a judgment of ouster, but only a judgment of seizure into the king's hands, and that shall be the subject matter of a new grant, and a restitution; or, to be more correct, "they may have recourse to the king's mercy for restitution."

To shew that a judgment of this kind does not extinguish the corporate capacity, where it has once had a legal existence, the case put by Sir Robert Sawyer again in page 21 of his argument, seems to bear upon this question, where he is led to speak (entering very copiously into the subject) of the case of corporations *sole*; and if that be considered in analogy to corporations *aggregate*, the case will appear in the strongest light; for it is every day's practice, that whatever the natural person holding the franchise of a corporation *sole* may do towards incurring forfeitures of the most extended kind, by abuse of that franchise, or by any other act which will incur as to his own person a forfeiture, the corporate capacity *still exists*; the corporation never dies; it is the case of all the ecclesiastical *sole* corporations, which are the most common in daily observation and practice; and from the first great corporation of the king, down to the lowest that is known, though the body natural may lose its existence by death, by natural dissolution, by forfeiture, and a variety of other modes, the body politic still exists, and the precise same corporation, with the same rights and privileges, unaltered and undiminished, and capable of being renewed, is resumed by the next body natural that comes into its place.

Sir Robert Sawyer says, "single bodies politic have indisputably such conditions annexed to them upon the trust of their creation, and the breach of the condition is, in law, good cause of separating the politic person from the natural by deprivation,"

"vation, which, in the civil law, is of the same effect as judgment of ouster by the common law, and their suspension hath some resemblance with our seizures into the king's hands."

Now, if this analogy be just, it is perfectly clear, from what I have stated, that deprivation of the natural person in the case of corporations sole, and ecclesiastical corporations, does not at all affect the politic capacity; it remains unaltered and unimpaired to be exercised and enjoyed by the next person who shall be put in possession of it; so too, like the deprivation by judgment of ouster, where judgment of ouster may be given against *particular* members, or even against *all* the members of a corporation, by which there is a separation (to carry on the analogy) between the natural persons that held the franchise, and the franchise itself; yet still the franchise itself exists. A judgment of ouster no more destroys the franchise of a corporation aggregate, than that of deprivation does that of a corporation sole.

That the privileges of a corporation cannot be seized as forfeited, appears by a strong authority in *Coke, 4 Instit. 228*; and that authority goes still further than I am now contending for; because, in the present course of the argument, the proposition that I undertook to maintain, was only that the corporate capacity itself, the *existence* and *essence* of the corporation cannot be destroyed: but this authority holds, that the rights and privileges of *franchises*, existing in a corporation, cannot be seized as forfeited; and *there* is the distinction. They may be seized into the king's hands, but they cannot be seized as forfeited without the authority of an act of parliament.

It was a very strong ground of forfeiture indeed in the case of the corporation of Cambridge, where they had been guilty of a most outrageous misbehaviour, which called as much for animadversion and punishment as any could do, and such as if a legal forfeiture could be incurred, *would* certainly incur such a forfeiture. In short, it was thought of importance enough to be brought before parliament. They were summoned to appear, and shew cause why their liberties should not be seized as forfeited. They did appear. They could offer no justification for their conduct; and at last they submitted themselves to the king's mercy and grace, saving their answers to all other matters. The king thereupon, not by judgment in any other court, but *by common consent of parliament, and by authority of the same*, (the words are very particular, they seem to be very cautiously guarded) seized the said liberties into his hands, as forfeited. He might, without the authority of parliament, have seized the liberties into his hands; but it is expressly stated, that it is by the *common consent of parliament, and by the authority of the same*, that the king seized the liberties as forfeited. And so clear and strong is the opinion of my Lord Coke upon that point, that not content with stating in the book expressly in the words I have mentioned to your Lordships, that this was done by common consent of parliament, and by the authority of the same, he seems anxious, that the reader may not be misled, that that circumstance may not escape his attention, that he may not draw false conclusions from this case, and suppose that the liberties and franchises of a corporation may be forfeited otherwise to the crown. In a marginal note he adds, "Note, It was done by act of parliament;" and he refers to the parliament roll.

So there cannot be a stronger indication of the opinion of that very great and learned lawyer, that even in the gross case he has stated, the authority of parliament was necessary to create the forfeiture.

That this is so, appears still stronger, by indisputable facts appearing of record, and in the books of law, than it can by any mere authority or *dictum* whatever; because, in point of fact, corporations, after judgment of seizure into the king's hands, have continued to act, have continued to enjoy that corporate capacity which I contend cannot be extinguished by any such judgment. That they have taken re-grants in their old corporate capacity, and that after those re-grants they have kept their former titles, and even been considered as corporations by prescription, by their former titles; instances of that are numerous: I shall mention a few.

In *Cro. Car.* 252, in the case of the *King* versus the *Mayor* and *Commonalty* of *London*, for suffering a riot, in which Doctor Lamb was slain — (the principle of the case is not material, because it ended in an amercement of the city, for not exercising properly their authority as magistrates in a corporate capacity) — It is stated, at the end of that case, “ that in the 21st of Henry VI. a presentment was before Fortescue, against the town of Norwich, that there was a great riot in Norwich, and one Gladman took upon him to be king, and went with a crown of paper in a riotous manner to the priory of Norwich, &c. and although it appears not upon the roll *quid inde venit*, yet, by 27 H. VI. *pat. rol.* 19, their liberties for that cause were seized and re-granted.”

Therefore that is an express authority to shew, that upon a seizure of the liberties of a corporation, they were capable of taking a re-grant.

The liberties of Norwich were seized into the king's hands in the reign of King John. Again, the liberties of Norwich were seized for a great riot, and burning the church; and yet it is well known, that not only those liberties were re-granted; in the 27th Hen. VI. but your lordships see, that after all these several seizures, the corporation of Norwich is still existing; and it is an undoubted fact, that Norwich is at this day a corporation by prescription.

In the same manner the liberties of Oxford were seized, 32 H. III. but the ancient corporation of Oxford still subsists, notwithstanding that seizure; because its corporate capacity was not extinguished by it. The town of Southampton, 18 Edward I. was seized into the king's hands, for wounding to death an officer, in serving the king's writs: they afterward submitted to a fine, and took a new grant, and raised their fee-farm rent to twenty pounds per annum; yet the corporation of Southampton is now a corporation by prescription.

A number of cases are cited of the seizure of the liberties of the city of London itself into the king's hands, in Sir Robert Sawyer's argument, p. 37: “ In the 16th of Richard II. the commissioners sat at Eaton, and the mayor, sheriffs, and aldermen, were convicted of several miscarriages; and the liberty of the city, by the judgment of the court, was seized into the king's hands; and the king, by the advice of his council at Windsor, constituted Baldwin Badington mayor, in the room of William Venner, and two other sheriffs, and twenty-four aldermen, to hold during the king's pleasure; and they all took the oaths, before the king and his privy council. And in that record the prior of Christ-church was sworn an alderman.”

“ In the same year, the king, at the intercession of the queen, grants to the aldermen, sheriffs, and citizens, that they might use their franchises as they did before the seizure, but with this clause of restriction, *Quousque aliter ordinaverimus.*” “ Upon which the city chose John Hend mayor, and John Shadworth and Henry Venner sheriffs, who were removed the same year by the king, and Henry Dalingrugs appointed mayor, to hold during the king's pleasure.”

“ And in the 20th of Richard II. the king makes a full restitution to them of their liberties.”

It therefore does appear, that though the liberties of the city of London were seized into the king's hands, they were not only capable of taking a re-grant, but that by that re-grant they were in of their former liberties, notwithstanding an intervening grant of the crown to other persons to exercise their functions.

In page 107, which is in Pollexfen's argument, he recites there a number of records, to shew, that not only the city of London had by re-grant resumed its ancient functions after different judgments of seizure into the king's hands, but that the corporate capacity itself, the being of the corporation, was not even suspended by that judgment of seizure; for he cites instances to shew, that even during that suspension of the active functions of the corporation, (of the magistracy of the corporation) by a seizure into the king's hands, yet corporate acts were done even during the time of that suspension, and he states these facts from the record.

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"The putting a *custos* by King Edward I. continued for the space of eleven years;" so that there was a suspension for eleven years, as to the regular corporate magistracy of the city of London; and according to the doctrine that must be now contended for on the other side, to support their ground, during that time at least, the corporate functions must cease. So far from it, your lordships will find, that, during all those eleven years, the privilege of being a corporation to certain purposes still continued notwithstanding. The court of Hustings continued to be holden during all that time, which is a corporate court, holden by prescription, and confirmed by certain charters prior to that period.

In the 18th of Edward I. which was during that suspension, (for it began the 15th; and lasted till the 26th) the city made a conveyance, by lease, of an house belonging to the corporation: A court of aldermen was also holden, before the *custos* appointed by the crown, and the aldermen of the corporation. In the 16th of Edward I. they presented sheriffs, according to the antient custom of their corporation, in the Exchequer. In the 18th, the 21st, and the 23d of Edward I. there are the like presentments; and in the 21st of Edward I. they brought a suit in their corporate name, and in their corporate character. Auby le Arther was attached to answer the commonalty of the city, for that, he being no freeman, merchandized in the city: which is the strongest act to shew that their corporate capacity still continued, and was exercised. There is another suit of the same kind against a non-freeman to be found on the same roll. And in the 22d of Edward I. there is a writ of right in the court of Hustings brought by the corporation itself, in the name of the mayor and citizens of London.

These cases shew, that even during the time of the seizure into the king's hands, and while the corporation, in a certain degree, and to certain purposes, laboured under a suspension of particular rights and franchises of their charter, their chief magistrate being suspended, and a *custos* appointed by the crown, yet still they exercised their corporate functions.

Lord Coke, 2 *Inst.* 222, in his reading upon the statute of Westminster, first upon that part of it which respects the taking outrageous tolls at fairs and markets, speaking of a clause authorizing the crown to seize the franchise on that ground, explains the words *prendra le franchise*, &c. in this manner; that is, says he, "shall seize the franchise of the fair and market, *until it be redeemed by the owner*." "But this also," says he, "is intended to be upon office found." So that, in this instance, though the act of parliament gives express authority to the crown to seize the franchise for that which ought to be, if any thing can be, a forfeiture of that particular franchise, namely, for the abuse of the franchise itself; yet Lord Coke holds the act of parliament to authorize no such thing as a forfeiture, but the seizure shall be only *till it shall be redeemed by the owner*; so that even that seizure should not operate, notwithstanding the express words of the act, till something is done to put the crown in possession, and that it shall be upon office found.

So that from the whole current of these authorities taken together, it appears clearly, that a judgment of seizure is the only judgment which can by law be given in a case where a corporation has once had a legal existence. I contend, that judgment of ouster, properly so called, cannot, by law, be given in a case where a corporation has had existence, and that a judgment of seizure is the only one that can be given, and which is merely in the nature of a process to compel their submission; (for in their natural capacity they are not amenable for corporate offences) and to make them amenable to the laws and government of their country in the courts of justice for offences committed in their corporate capacities. That is merely a suspension of those rights, and the moment its effect is answered, the corporation is brought, by that means, like a natural person, to be amenable in its corporate capacity, to justice. That justice, whatever it be, shall be done. Particular rights which are abused shall be suspended for a time, that the corporation, in its corporate capacity, and out of its corporate fund, may be amerced. In short, that the court

may

may do what to law and justice appertains. But when that is done, the judgment of seizure shall no longer have effect, and the corporation is in of its antient rights.

The whole of these authorities seem to me to point to that construction, and I believe my learned friends on the other side will not be able to cite to your Lordships any one authority to the contrary.

There is another legal distinction, which it is material for the court to attend to, in considering the effect of the judgment which is stated upon this record against the old corporation of Chester; for it is a judgment not against A the mayor, B, C, and D, the aldermen, E, F and G, the common councilmen, and so on, going through the other members of the corporation, and stating that they had usurped, or had abused any franchise; but it is an information against the mayor and citizens of Chester *in their corporate capacity*, and by their corporate description, stating that they had *usurped* to be a corporation.

Now it appears, that there was no pretence for a charge of usurpation, because it is expressly stated upon this record, that they were a corporation, that they had charters from the crown, that those charters subsisted at the very moment that the judgment *quousque* in the quo warranto was given. So that it brings the case clearly within the authorities I have cited, to shew that against the city of Chester, upon that information, no judgment of ouster could legally be given; because it is stated upon this record in express terms, and the court cannot shut their eyes to it, that the corporation of Chester, antecedent to that judgment, had a legal existence. Now if it had, it is admitted by all the crown lawyers, (Sir Robert Sawyer, in direct terms, states the rule to be) that no judgment of ouster shall be given, but judgment of seizure only, because judgment of ouster can be given in no case, except where the franchise usurped had no legal existence,

In this case, I do not mean to keep back from the court any thing I have met with that appears to be at all material. Admitting, therefore, that there are some *dicta* to shew that by possibility a corporation *may* be dissolved by a judgment, I shall shew, that, even in those cases, it has been clearly held, that it cannot be upon an information such as that stated upon this record; for where the effect of an information shall be such a judgment of ouster against *each of the members*, which, like their natural death, may, in its consequences, annihilate the corporation, (for your Lordships will find that will be the only way of reconciling the different opinions, and of understanding the *dicta* thrown out in some of the books) nevertheless, all the authorities without exception, every *dictum* in the books, is express, that by no other judgment than *that*, can a corporation be annihilated, and that such a judgment cannot be given upon an information against the corporation itself by its corporate name.

In page 70 of *Pollexfen's* argument, in the case of the London quo warranto, it is stated, "that *Rol. Rep.* 2, 15, is express, that if a quo warranto be brought to "dissolve a corporation, the writ ought to be brought against the *particular persons*; "for the writ supposeth that it is no corporation."

That reason seems to carry its own good sense along with it; for it certainly is a gross absurdity to style upon a record a corporation by its corporate name, and admit it has existence, and then to say that it has usurped it. "This difference is "there taken when the attorney-general supposeth the defendants to be a *corporation*; "but otherwise when he questions them as *inhabitants* of a ville; *then* they must "shew themselves a corporation, and also prove it." And then there is reference to my Lord Hale's common-place-book in Lincoln's-Inn library, fo. 168, in which this doctrine is most clearly and distinctly laid down.

"*Note*, If a quo warranto be brought for usurping to be a corporation, it shall be brought against *particular persons*, because it is, in *disaffirmance* of the corporation, and judgment shall be given, that the particular persons shall be ousted; but if the quo warranto is brought for *liberties claimed* by a corporation, then it shall be brought against the corporation itself."

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This is a clear, sound, legal distinction ; a *corporation* cannot *usurp* to be a corporation ; they are, or are not, a corporation : if they *are* a corporation, antecedent to the information, they cannot usurp the existence of a corporation ; they may usurp *certain franchises* ; and therefore, if a corporation is charged with usurping franchises which do not belong to it, in that case, the present information in quo warranto is the proper one to be brought against the corporation by its corporate description. But if, on the other hand, the *corporate existence* itself is denied, if it is denied that there is *any corporation* in Chester, or in any particular place, then that information must be brought against A, B, and C, for falsely taking upon themselves to be a corporation, (where none in point of law existed) to shew by what right they claim to be a corporation. The distinction is sound in sense, and in law ; and in *that* all the authorities concur.

With respect to the effect of a judgment against particular members of a corporation, though that judgment is such as necessarily to suspend all the functions of the corporation, yet if a new charter is afterwards granted to that corporation, its former rights and functions shall revive, and they shall be held to be in of their old rights, and not by their new grant.

I shall cite an authority to support this proposition, that even in cases where the functions of a corporation are by judgment suspended, yet when once that corporation takes a re-grant, or a new grant, its old rights and privileges are revived, and they are in of their old and better title. I shall cite the authority I am going to mention to your Lordships, notwithstanding the *dictum* in it ; upon which, perhaps, my learned friend may lay his finger. The case I mean is in 3 *Burr.* 1866. The mayor, &c. of Colchester against Seaber ; and there it is stated, that though the functions of the corporation had been totally suspended by judgment of ouster against the mayor and all the aldermen, who are all stated to be naturally dead before the grant of a new charter ; yet upon that new charter being granted, their former rights were held by the court to be revived. It is true, in that case, a doubt is thrown out by some of the judges, what it would have been if the judgment of ouster had been against the corporation itself ; and it is said by Justice Wilmott, that that may be a forfeiture.

But in answer to any advantage my learned friends may wish to derive from this, it is sufficient to say, *that* point was not before the court ; and the *dictum* therefore is extrajudicial, and it certainly is not positive, but is rather indicative of a doubt.

I submit to your Lordships, that I have stated a clear authority, to shew, that if the information had been against the corporation itself, the judgment could not have been a judgment of ouster, and for that I shall cite other authorities before I sit down.

In 4 *Mod.* 58, which is sometimes called Sir James Smith's case. It was a mandamus applied for by Sir James Smith, to restore him to the office of alderman of the city of London, upon an allegation that he was duly an alderman. The answer to it was, that he had omitted to take the oaths required by the statute of the first of William and Mary, which oaths are required to be taken by all who were then in any corporate office. The question, therefore, before the court was, whether at the time of that act passing he was an alderman or not ; for if he was, it was agreed that he was not intitled to a mandamus to be restored, because he had not complied with the requisites of that act, and therefore his corporate function was void : if he was not an alderman at the time of the act of parliament, he was not within the purview of it, and was duly an alderman.

Upon this question my Lord Holt says, " a corporation *may be dissolved*, (and I know from other authorities it was the opinion of Lord Holt ; we certainly must meet the authority of that one great name upon this part of the question) for it is created upon a trust, and if that be broken it is forfeited." So far against the general proposition certainly goes the authority of Lord Holt ; but then I shall gain quite as much, and more, than I shall lose by referring to it ; because, though he holds that in common cases a corporation may be forfeited, and may be dissolved, by the judgment

judgment of the king's courts, yet he is most expressly clear and positive, that it is not in such a case as this, and that it cannot be done by a judgment of *seizure*, nor can it be done in an information against the corporation itself: so that upon these two points (which perfectly exclude the opinion of Lord Holt having any operation upon the present question) he agrees with the other judges, and is express in his own opinion, and from authority, that neither can a corporation be considered as dissolved by a judgment of seizure, nor can a judgment that amounts to a judgment of forfeiture, or dissolution, be given upon an information against the corporation itself. But "a judgment of seizure cannot be proper in such a case; for if it be dissolved, to what purpose should it be seized?" Referring, therefore, to the judgment in quo warranto, in the case of London, which is stronger than the judgment stated on this record, in the case of the city of Chester, he expressly holds, that that corporation was not dissolved; for it doth neither extinguish nor dissolve the body politic.

"Wherever any judgment is given for the king, for a liberty that is usurped," which is the judgment of ouster, "there the quo warranto must be brought against particular persons;" (and that, your lordships will find, all the authorities without exception are unanimous in, with an exception only of the *dictum* I have taken notice of in the case of the mayor of Colchester.) "But where it is a liberty claimed by the mayor and the corporation, there it must be brought against the body politic; in which case there may be a seizure of the liberties, which will not warrant either the seizure or dissolution of the corporation itself;" that is, when it is against the body politic. He goes farther, and states there, "that it will not warrant the seizure of the liberties of the corporation;" "therefore," (concludes the court) "the corporation being not dissolved, Sir James Smith was still an alderman, and ought to have taken the oaths before the first day of August, and therefore the mandamus ought not to go."

And this is indeed a very strong case, when it comes to be attentively considered; because it not only proves, that the corporate capacity of the city of London was not dissolved by the legal effect of the judgment in quo warranto before the act of parliament of restitution, but it goes much farther; it proves that the corporate capacity was not held even to be seized, or *seizable*, into the hands of the crown; and so far from it, that, even during the suspension of certain franchises of the corporation of London, and even at the time when that judgment was in full force, and it had all the effect which by law it could have, not only the corporate capacity, but the corporate officers, existed,—the same aldermen continued, and Sir James Smith, who was an alderman at the time of the judgment, was held to be an alderman at the time of the accession of King William, before the charter for the restoration of the corporation had passed.

The same case is reported in *Skin.* 310. It is also reported in *Shaw.* 274. I mention particularly the report of Skinner, for a very strong circumstance which is to be met with in it, and which I have traced, and have fully ascertained the meaning and import of.

In mentioning the case of Sir James Smith, I have conceded, that though upon the broad proposition, that a corporation can in no case be dissolved or forfeited, the opinion of Lord Holt is against me, yet I have availed myself of his opinion, in the most decided manner, upon every point that can bear upon this record. And your lordships know, that how great and respectable soever the name of any single judge may be, that which is always to be considered as authority in the courts of law, sitting in judgment upon a question, is the opinion of the majority, and not the name or consequence of a particular judge. The other three judges, your lordships will find, in all the reports of this case, concurred in opinion entirely with Lord Holt—that judgment of seizure or of ouster of a corporation could not be given upon an information against the corporation itself. They differed upon the question, whether a corporation could be forfeited or not? So that the opinion of the other three judges is the authority, and not the opinion, of Lord Holt, how
great

great soever his name be. But it was not the opinion of the three judges only that was against Lord Holt, upon the abstract general question; for I find the general opinion of the judges of that time went the full length of the proposition for which I contend, and that appears clearly by the report in *Skin.* for after he has gone on to state the case, as I have quoted it from 4 *Mod.* after having stated Lord Holt's opinion, that in some cases, perhaps, and by some kinds of judgment—but clearly not by this kind of judgment—a corporation might be dissolved, forfeited, or seized into the king's hands. He adds, that “ten judges were of a contrary opinion!” This I have endeavoured to trace, and find it alludes to the opinion of the judges, which was taken by the house of lords on the 22d of January, 1689, upon the bill which was brought into parliament by the whigs of those days, for restoring the corporations of the kingdom to their former rights. That bill contained a declaratory clause, that the judgments declaring the corporations to be forfeited, were contrary to law; and upon that general question the house of lords asked the opinion of the judges, and upon that occasion there were ten who declared their opinions contrary to Lord Holt's. In stating this, and referring my learned friends to the date in the general, I apprise them and your lordships too, that the opinion of the judges does not appear upon the journals; it never does: all that appears upon the journals, is, that upon that day the opinion of the judges was taken upon that question; and therefore I rest upon the authority of *Skinner*, to shew, that upon the giving of that opinion, ten judges differed from Lord Holt. That is a fair state of the authority as it really is.

I therefore am in possession of the unanimous opinion of all the judges, including Lord Holt, at the time of the Revolution, that upon an information in quo warranto, against a corporation, by its corporate description, no judgment of ouster can be given; and that no judgment even of seizure of the franchise of being a corporation, can by law be given upon such an information as is stated upon the present record.

I am farther in possession of the opinion of ten judges against two, (for I will presume, though it is not stated, that the other judge, if all the twelve judges were present, agreed with Lord Holt) that upon the general proposition, the franchise of being a corporation is not forfeitable at all.

Thus, therefore, it stands, in point of authority, upon that great question which seems to me to be the ground and foundation in the consideration of this case; for it is certainly necessary to ascertain what the legal effect of the different kinds of judgments in quo warranto is, before the court can accurately decide upon this record what is or is not the subsisting constitution of the corporation of Chester at this day.

I therefore contend that I have established, from the clearest authorities, running in a series from the earliest times down to the present, (and without one single judicial authority to the contrary) that at the time the judgment *quousque*, stated upon this record, was given, there was an existing corporation in the city of Chester, and existing, as appears by the record, under a charter of Henry VII. confirmed by Elizabeth; and I flatter myself I have also proved, that it continued to exist *after* the judgment, by such unanswerable authorities, that no lawyer can hesitate upon the question a single moment.

Then if the corporation of Chester, (by which I mean the old corporation) under the charters of Henry VII. and of Elizabeth, existed the day *after* the judgment *quousque*, which is stated upon this record, I should wish my learned friends to tell me when it *ceased* to exist—to tell me what has been done in this case to put an end to its existence—to tell me what appears upon this record from whence a single argument or inference can be drawn to prove that it does not exist at this instant.

The next transaction, in point of time, stated upon this record, is the charter of 37 Charles II. directed to the citizens and inhabitants of Chester, *except* certain persons specifically named in that charter, (to the number, I think, of seven; the

number, however, is totally immaterial.) It is granted to the citizens and inhabitants of Chester; not by any corporate name or description, but, as it might be, to the citizens and inhabitants of any other town, where no corporation existed, with the exception of certain persons by name.

Now let us consider a moment what the *legal effect* of such a charter is, for beyond *that* the fact of acceptance found by the jury can never go. The parties to whom it was addressed, were found by this jury to have accepted it. I will not say a word to your lordships about the propriety of that finding, because it is not now before the court: I should have much to say upon it if it was.

Now, what would be the legal effect and operation of a charter granted to a place situated as Chester was at that moment? In Chester there was a subsisting corporation, to wit, the mayor and citizens of Chester, under the charters of Henry VII. and of Elizabeth; for neither those charters, nor the existence of that corporation, was at all affected, as I trust I have proved, by the judgment *quousque*, in 35 Charles II.

The first authority I shall have recourse to, is one that has already been mentioned to your lordships, and that is the case of *Hayward v. Fulber*; for in that case, it is not only held that the corporation could not surrender itself, but that if a charter be granted to a set of persons, in a place where an old charter of incorporation is subsisting, and to the same purposes as that old charter, granted as a new charter, and not as a confirmation, explanation, or alteration of the old one, such a subsequent charter is void.

Apply this to the case of Chester: Here is a corporation subsisting; not a guild or fraternity for a particular purpose, or for carrying on this or that particular trade, but a general corporation for the government of the place—grantees, proprietors and governors of the city itself: such a corporation, existing at the time of granting the charter of Charles II. the king is *deceived in his grant*. Fancying that there is no corporation in Chester—fancying that something, which had been done, had an effect which I have proved by law it could not have—fancying that if there ever had been a corporation in Chester, it was dissolved—and that therefore he had a right to incorporate the inhabitants of that town, like any other town in England, by a new charter of incorporation, and to model them according to his pleasure;—under all this error and mistake, the king grants a charter to the citizens and inhabitants of Chester, where there was a corporation then existing. Then that charter is a mere nullity; and no acceptance of any persons can make it good, unless it had been addressed to the *old corporation*, and been accepted by *them*: and that leads me strongly to think, that the opinion suggested by the learned judge who first tried the cause, was the true, accurate and legal way of considering the question; and that the true question upon this record, which ought to have gone to the jury, and which did go to the jury, as the question was put by *him*, was, *whether the antient corporation did accept that charter?* because no other could accept it.

The point of view in which that first struck the learned judge, when it is sifted and canvassed, and when the books are looked into, seems to be more correct, in point of law, than perhaps even that learned judge, at that time, thought it to be.

It is found upon this record, that there was an existing corporation: Your lordships cannot say there was not; and therefore it is true that the legal import of that issue was, whether that charter was accepted by the only persons who could accept it? for there were no other persons in Chester, who could have a right to accept it. Where a new charter is granted, under this sort of mistaken idea, that a new charter is required, and that the old one does not exist, that the persons under that new charter cannot act legally, appears by the authority of a case that I shall state to your lordships of *Butler v. Palmer*, in *Salk.* 191. It was an action for a false return to a mandamus: It appears that King Edward III. granted to the burgesses of Dartmouth, a charter to elect a mayor, *de seipis*, annually; and, by constitutions made in the reign of Queen Elizabeth and King James I. and long usage in pursuance thereof, the method was, for the common-council to propose two persons at

once,

once, for the freemen to chuse out one of them : that this did continue till 1631, and then a bye-law was made, for repealing all former bye-laws, and ordaining, that for the future, elections should be made by the freemen at large ; and accordingly the two succeeding elections were made. In the year 1684, the old charter was surrendered, (but that surrender was never enrolled) and a new charter granted, under which the town made a bye-law, repealing the bye-law made in 1631. The court resolved, " As to the new charter, and bye-laws made under it, if " those that were members under the old charter happened to be the only persons " that acted, they should be deemed to act by virtue of their old charter ; but if " commixed with others that were only members under the new charter, though " the old members were the majority, yet they must be taken to act by virtue of " the new charter, and then *what they did was void.*" [*Vide case of the corpor. of Bewdley, 1 P. Wms. 207.*]

Can any thing shew more strongly, that where a grant of a new charter is made by the crown, founded upon a supposition (which turns out either in point of fact or of law to be mistaken) that there is no corporation then existing, no charter in force, that subsequent charter is void ? No acceptance, no acting under it, can make it good ; nay, so void is it, that if the persons who derive their authority from it only *intermix* with those who act under the old charter, the whole proceedings shall be void and a mere nullity.

I therefore conceive, that, in order to make any thing of this point at all, my learned friends must be driven to a very strange and monstrous proposition indeed, and which seems to have floated in the mind of my learned friend, (Mr. Bower) when he made this motion ; an idea which nothing but extreme distress could have ever introduced into such an understanding as his : because it does not appear to me, that imagination ever suggested a more monstrous proposition ; and *that is*, the supposition that there may be *two* corporations in Chester, and that Mr. Amery may be a good alderman of one of those corporations !—Says my friend, " he does " not claim to be a member of your corporation under the charter of Henry the " Seventh." It was thrown out merely by way of conjecture, and hypothetically ; for my friend could not bring himself up all at once, to assert that such a thing could exist in law and fact. But supposing there could be two corporations, it is asked why might not Mr. Amery be a member of one, if he does not claim to be a member of the other ? Mr. Amery, if there could be two corporations, might enjoy his freedom of the one, if he pleased ; but I venture to foretel (it is so absurd) that my learned friend will not revert to it when he speaks.

Need I state what the nature of such a corporation is ? or how it is distinguished from that sort of corporation which must have suggested the idea to my learned friend ? The idea must have been suggested from a guild or fraternity, a corporation established for the purposes of a particular trade, the government of an hospital, or something of that nature. In the case of *Cuddon v. Eastwick*, in *Salk. 193*, which arose upon a question, whether a corporation could make a corporation without the authority of the crown ? It was held they could make a guild or fraternity, but not a corporation. And then the idea of a corporation, so distinguished, is stated thus : " A corporation is, properly, an investing the people of the place with " the local government thereof, and therefore their laws shall bind strangers." Now, taking this to be a corporation, and that this is the corporation of Chester, your lordships need only read this record, to see that *their* charter states *their* corporation to be such an one—*our* charter states *our* corporation to be such an one. Each charter grants to the people to whom it is addressed, that the city of Chester shall be a county of itself. They grant that city in fee-farm to the corporation—they grant to the corporation the government of that city, the power of making bye-laws, the power of electing magistrates to govern the city ;—all these powers are granted by each of the charters, to the persons whom they mean to incorporate. Then will my learned friend get up and tell the court that there are two

cities of Chester, that are counties in themselves? or that the same city of Chester at this moment belongs to two corporate and distinct bodies of men?

Mr. Justice *Buller*. You need not combat that.

Mr. Justice *Grose*. Mr. *Bower*, when he moved for the rule, said so, as I understand.

Mr. *Bower*. Certainly not that there could be two corporations in the same place.

Mr. Serjeant *Adair*. Then I am perfectly founded in saying, that I need not expect from my learned friend, or any body, ever to hear of such an idea again. Then, if there are not two corporations, how will my friend get over the authorities which shew that the old corporation existed, and that the crown could not grant a new charter of incorporation?

I do not mean to contend that the crown could not grant a charter, new-modifying that old corporation—that such charter, new-modifying the old corporation, if accepted by that corporation, would not bind them: But the proposition I contend for is this, that there being an old corporation *in esse*, possessed of the charters that were in force, the crown could not grant a new charter of incorporation; and under the authorities I have cited, it is clear that such charter of incorporation was *ipso facto* void, and a mere nullity.

Besides that proposition, I say that the old corporation existing at the time of the issuing of the supposed charter of Charles II. the crown does another thing which it has not power to do, and which I have already cited authorities to prove it has not: The crown has not power to dissolve a corporation itself, nor power to take away any of its rights and franchises; yet the crown, by its own authority, without any judgment of a court of law, does, by the charter of Charles II. disfranchise those persons *excepted* in that charter.

Will your lordships ever decide upon any argument, that the crown has such a prerogative?—that, without any information filed against A, B, C, D, E, F, and G—without any process of law against them—without any judgment against them personally—the crown, by the great seal, under the name of a new charter, can disfranchise these seven people? If they can disfranchise seven, they might disfranchise seven hundred!

Then I contend that Roger Whitley, and the six other persons, being then members of a subsisting corporation, under charters which I have proved not to have been forfeited, nor even suspended, but then in force; the crown could not disfranchise them; the crown could not grant a new charter, even if it had been to all the rest of the old corporation, with an exception of *them*, because that is in effect, though not in terms, a disfranchisement. And I beg leave to contend, notwithstanding the finding of the jury, that this charter (such as it is) of Charles II. was in fact accepted by the citizens and inhabitants,—that it could not be accepted by *them*, because there were seven persons who had a corporate right vested in them, who could not accept, because the charter has excepted them.

It cannot be said that, under the general finding, Whitley and these others are included, and that they had accepted. It would be a monstrous absurdity indeed, when the king says, expressly, “I wont grant you any privileges,” to say that you shall have a right to accept these privileges: the thing is impossible and absurd, and therefore I contend that, by law, *there could not be an acceptance of the charter by any persons*; not by the citizens and inhabitants at large, because there is a corporation subsisting in Chester; and therefore the citizens and inhabitants at large, who were not members of that old corporation, I conceive it is already conceded to me, could not accept it; for it is conceded that there *could not* be two corporations: if persons distinct from the old corporation could accept, there *would* be two corporations.

Other persons, they say, might accept the charter. Then there must be either one or two corporations; therefore I conceive it is proved, in this case, that either nobody could accept the new charter but the old corporation, or that it must be accepted by no persons in Chester; I leave my friends to take the one or the other.

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If citizens and inhabitants should be construed by the court now to mean what the learned judge who first tried the cause thought it did mean—if it should be open to that construction upon the record—and if your lordships should, upon more mature consideration, think that, under all the circumstances of the case, the true construction of *citizens and inhabitants* must be such citizens and inhabitants as could by law accept—such persons who, being already incorporated, could accept the grant: Then, I say, they could not accept it to the exclusion of those seven persons excepted, because that would amount to a disfranchisement without a fault alledged, without a process and judgment against them, or any one thing which could give right and power for an amotion.

I therefore contend, that in every point of view in which this case can be considered, whether of reason, law, or authority, the charter of Charles II. is a mere nullity. The finding of the issue of acceptance is, then, a mere immaterial finding; it is finding an acceptance of that which could have no legal operation, because there were no persons existing who could so accept.

If I am right in this part of the argument, it goes the whole length of making an end of the case; for if it be true that the corporation of Chester still subsisted under the charters of Henry VII. and of Elizabeth, and if it be true that the charter of Charles II. under all the circumstances, and considered as a new charter of incorporation, could not have any legal effect or operation to destroy that old corporation, nor could in point of law even be accepted by that corporation,—it follows that the charters of Henry VII. and Elizabeth are still the subsisting charters of Chester, and that Mr. Amery, having been elected contrary to the provisions of those charters, is not duly elected an alderman, and that there should be judgment for the crown. This would be the law, in my apprehension, upon this record, if the jury had found *all* the issues against us.

If the jury had not only found that this supposed charter of Charles II. was duly accepted—but that no order of amotion was made by James II. that no charter of James II. was accepted, no charter of restitution ever granted—I say still, upon this record, Mr. Amery would have set forth a defective title; because he would have claimed under a charter granted under circumstances in which, in point of law, it could not have operated; and the jury would have found an acceptance which could not, in point of law, operate, because there were no persons to accept.

But I do not mean to neglect wholly the finding of the jury upon the other two issues.

I believe it will not be denied to me (but if it is, I will state one case to prove it, the *King v. Leigh*, 4 Burr. 2146) that in a quo warranto, if any one material issue is found for the crown, the crown must have judgment.

It will require all the abilities of my learned friends, and they will undertake a considerable weight of argument, if they attempt to shew that neither of the issues found for the crown are at all material upon this record. To say it is not at all material that it is found that the amotion of the persons named in the order of King James was duly signified to those persons: to say it is not at all material that it was found that there was no final judgment of ouster—will be a difficult proposition to maintain; for if my friends were to depend so much upon the effect of a judgment of ouster, if it had been found for them, is it possible to say that an issue shall be material if found one way, and not so if found the other? Is it quite immaterial, upon this record, whether any judgment of ouster was given or not? I trust the authorities I have cited shew that it is extremely material. Those authorities shew that there is a marked distinction between a judgment of *seizure* and judgment of *ouster*; a distinction which makes all the difference in this cause; for they shew that if even a judgment of ouster would not have done, what they contend for, *a fortiori*, a judgment of seizure would not do it.

But be it as it may with respect to a judgment of ouster, if that judgment had been regularly given—give them all the advantage of the *dictum* of Lord Holt—give them the effect of all the *dicta* found in the books with respect to the effect of a judg-

a judgment of ouster---does not that make it still more material whether such an issue is found or not? Will they, when they argue what would have been the effect of a judgment of ouster if so given, in the next breath argue that it is immaterial whether it was given or not? Will they argue that a judgment of seizure and a judgment *quousque* too are exactly the same thing as a judgment of ouster? But all *that* they must prove, or else that issue is clearly a material issue upon this record.

The undeniable principles which courts of law have ever proceeded upon in judgments of quo warranto, where there is one material issue at least found for the crown, is, that the crown is entitled to judgment.

But I must say a word or two upon the other issue, which I confess, notwithstanding what has been thrown out, I still conceive to be a material issue upon this record; and if it is, I not only avail myself of it upon the general principle, that upon finding a material issue the judgment must be for the crown; but if it is a material issue in point of law, in point of fact it is completely decisive of this question; I mean the signification of the order of amotion to the persons who are named in it.

It has been contended, upon former occasions---I believe, indeed, (which entitles it to still more respect) it has dropped from the court, upon a former occasion, that this clause in the charter of Charles II. does not give the king a power of destroying the corporation.

I must beg leave to consider that doctrine a little, and to see whether any construction can be put upon the clause that may not in its effect amount to that. I am ready to admit, that *in terms* it does not reserve to the king a power of annihilating the corporation that he *supposed* he had created, (for I think I have proved that it was only a supposition) but when your lordships come to try and weigh the case, you will find it was sufficient to effect that secret purpose, which it was not quite convenient for the crown at that moment to avow.

The purpose of the crown was certainly to garble and new-model all the corporations in the kingdom for very pernicious purposes, which it is needless to state to your Lordships. The crown, to a certain extent, in terms, reserves, at its own will and pleasure, without any reason assigned, *generally* to turn out *any persons* in the corporation. That, it is clear upon the face of it, is the manifest and avowed purpose: but, if the corporation is so incorrigible as that it cannot be sufficiently weeded and garbled; if there is no way to get rid of a troublesome corporation but by annihilating it; I contend that this clause has reserved *that* power. It is singular that the clause has taken care distinctly to enumerate every officer of every kind and description that exists in that corporation, from the mayor down to the leave-lookers, murengers, and other less significant officers.

Then what is the power to amove? It is to amove *any one or more* of them, without reason assigned, at the king's pleasure, and that they shall, without any other process, be *ipso facto* removed by the signification of that order. But it is said, "this cannot mean to remove *all*, because the others are to elect in the place of "those that are so removed." Now let us try that a moment by the test of investigation. Will it be denied that the king can remove the mayor under this power? I trust it will not. That he can remove one sheriff? No. That he can remove both sheriffs? I think that will hardly be denied; and so on, without troubling your Lordships with the recapitulation of the several officers. Will it be denied that he can remove one alderman? No. It is expressly granted. Will it be denied that he can remove two or three? No, because the clause expressly says, "any one or more." Then where are we to stop?

I beg that my learned friends will, for the information of the court, and for the satisfaction of the parties, point out, in the construction of this clause, where we can stop the power of the crown, if once it is set to work. Suppose the crown had issued, on the same day, as many different orders of council as there are different officers in this corporation; one order for removing the mayor; another specific order for removing each alderman; another for removing each common councilman,

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the sheriffs, and so on, to the amount of *all*. Can my learned friends state any ground or reason to shew why these orders would be void? Suppose a separate order was made to the amount *de facto* of all the aldermen, the same of all the common councilmen, the same of all the officers of the corporation, I should like my friends to state how those gentlemen would retain their titles after such an order. It is plain the same power that gives the right of removing *one*, gives the right of removing *three*; the same that gives the right of removing three, gives the right of removing *ten*; that which gives the right of removing ten, gives the right of removing *twenty*. Then where are you to stop? It is impossible to draw the line, or to say that any one of those orders would be void. Yet the moment those orders are signified, there would be no mayor to hold a court, no aldermen to elect, no common councilmen. If that would be the case with those separate orders, will my learned friends contend that an order of council cannot include more than one in it? That would again be contrary to the express words of the power; for it is, that he, by order of council, may remove *one or more*; so that suppose, instead of sixty different orders, he made ten orders, each containing six; which of those ten would hold their place? What court of law would determine that any one of those orders of council were void? Then why not include *all* the names in one order? The crown has not made use of the word *all*, but it has done that which is clearly within the words of the power. It has removed A, B, C, D, E, and so on, who were aldermen. It has removed certain other persons who were common councilmen. It has removed the gentleman by name who was mayor, though it does not call him so. It has removed the two sheriffs, the town-clerk, and all the corporate officers.

Mr. Justice *Buller*. I wish you would state what you think would be the effect of the clause, supposing it went the length of reserving the power to the crown of removing all the corporators.

Mr. Serjeant *Adair*. Having already contended that this power is in effect the same, and that the exercise of it can by no operation that I can conceive of the human mind be so restrained as not, in fact, to extend to all; and the record having expressly stated that in fact it did extend to all: I shall then consider what it would have been, if in terms it had been the same as in effect it is; if it had expressly reserved a right in plain terms of dissolving the corporation.

I think it is not very material to me which side of that proposition I shall chuse to contend for; for if such a reservation of the crown is good in point of law, I avail myself of it by saying it has been exercised, and there is an end of the corporation. If such a reservation is bad, then I contend it avoids the charter, because where the crown grants, (and I need not, I trust, cite authorities to your lordships upon that point) upon a condition, and the crown is deceived in its grant, and that condition be void, or impossible, the effect is to do away the grant. The distinction which the law makes between the grant of the crown, and the grant of a common person, is this:—if in the grant of a common person the condition is void or impossible, the grant is absolute. In the case of the crown the direct contrary is true, for the grant is void. The king is deceived in his grant. He has fancied he could annex a condition to privileges; *non constat* that he would have granted those privileges at all without the condition; I verily believe Charles II. would not have granted them without the condition; but however *non constat* that the crown would have granted that without the condition annexed. So I care not whether it is good or bad; if the condition is void, they never existed as a corporation; if the condition is good, that existence has been legally destroyed.

On that point I have found no authorities. I verily think none are to be found, whether such a reservation in the crown is good or not; but I leave the dilemma to my learned friends, and let them make the most of it.

This use also I can make of this part of the argument, that if it appears at all doubtful whether this reservation was good or not, then can it be contended that it is an immaterial issue whether it was exercised or not? If it is doubtful whether the

the crown could reserve such a power; if it is doubtful how far it might or not affect the franchise of Mr. Amery, is it possible to contend that it is an immaterial issue? Therefore, I think every way of putting this question tends to shew that two material issues have been found for the crown in this case; and therefore the crown is intitled to judgment.

There is but one thing more that is necessary for me to trouble the court with, (the importance of the cause in point of precedent must be my only apology for dwelling so long upon it) that is, upon a fact which is not found by the jury, but is stated and admitted upon this record. I mean the acceptance of the charter of restitution of James II. And if the other grounds in the cause could admit of a doubt---if it were possible for any two lawyers in the court, after weighing the authorities, to think two different ways upon any of the other parts of the case, (which, I protest, it seems to me not to be) that charter would, in my opinion, put an end to that doubt, and reconcile both their opinions; for whether the charter of Charles II. was an operative charter or not, whether it could or could not be legally accepted by the persons who did accept it, or by any others; yet, if the old corporation was not totally annihilated, if it was not as if it had never been, if the very name and existence of the mayor and citizens of Chester, under the charter of Henry VII. was not by something or other completely done away; if they remained at all in Chester,—the charter of James II. puts an end to this cause; because it is expressly averred upon this record, and not denied, they have not ventured to take an issue upon it, that that charter was accepted by the old corporation of Chester. Then, if that old corporation existed, if that old corporation was capable of taking a grant, what becomes of the charter of Charles II. supposing it for the intermediate time to have been in ever so full force and vigour? Supposing it to have been accepted with joy and thankfulness by all those people who protested against it; supposing it to have been accepted and received with triumph by every inhabitant of Chester; yet, if there existed a corporation in Chester, capable of taking a grant, and if that corporation took the charter of James II. will my friends cite any authority to prove that the acceptance of a subsequent charter does not do away the inconsistent provisions of a former one? The conclusion then is inevitable, and that charter is now the subsisting charter of Chester. Then is Mr. Amery elected under that charter? has he pleaded that he was? But I will be content, for once, to wave the strict rule of law, which says that the defendant shall be bound by his plea, and by the title he has set up: he has set up a title, under the charter of Charles II. if he will shew that such title is consistent with the charter of James II. I will give up the cause.

Either, therefore, the charter of James II. considered as a charter of restitution and confirmation, is, together with the charters so restored and confirmed, the subsisting constitution of the corporation of Chester; and the intermediate charter of Charles II. though accepted, though acted under in all the provisions incompatible with the charter of restitution and confirmation, is completely done away by the subsequent acceptance of that charter:---either all those propositions are true; or we are driven back to the old absurdity, that there are two subsisting corporations in Chester, one under the charter of James II. another under the charter of Charles II. Which side of the argument my friends chuse, I must leave to them.

It is high time I should conclude, and leave the court to hear more material observations probably, from other quarters; perfectly assured, that, when they come to consider the authorities of law with that attention which the importance of the case deserves, there cannot be a shadow of doubt upon the occasion.

Adjourned.

June 19, 1787.

Mr. E R S K I N E.

AFTER the very comprehensive, able, and learned argument which the court heard yesterday, from Mr. Serjeant Adair, it is not my purpose to detain your lordships for any great length of time.

No part of the argument which your lordships heard yesterday appears to me to be either irrelevant or unimportant, because as we are not yet in possession of your lordships' opinion upon the effect of the *quousque* judgment stated on this record, it certainly was both relevant and important to contend, as Mr. Serjeant Adair contended, that no final judgment, even if its existence had been found by the jury, could have availed the defendant in this case. But while I therefore allow all due weight to that part of the argument, the more I look at this record, the more I am inclined to think that it is not strictly a *necessary* argument.

With respect to the case before your lordships, I apprehend, when I have stated the different circumstances which are here recorded, that it never can be material at all for your lordships to determine that *other* question. I likewise further think, that the second replication forms the great strength of the crown in this case; not that I do by any means wish to weaken the argument upon the first replication, which I think sufficiently sound and capable of carrying the effect of this ouster, yet I think it is not in the power of ingenuity (and I am sure we have much to contend with) to shake us for a single moment in your lordships' judgment, upon the ground of the second replication. Before I say any thing upon that, I will advert to what is said upon the first.

This is an information in the nature of a *quo warranto*, against Mr. Amery and Mr. Monk, for claiming, one to be an alderman, the other a common-council-man, of the city of Chester, and consequently their pleas and defence, *mutatis mutandis*, are the same.

Both the defendants plead an election under a charter of Charles II. This charter, which was granted in the thirty-seventh year of the reign of that prince, excepts, by name, Roger Whitley, esq. Thomas Whitley, John Mainwaring, William Williams, George Booth, William Street, George Mainwaring, and Michael Johnson. This will be very material to observe, because when the restoring charter comes to be stated, it will be seen that it has the effect of giving new validity to the antient charter; and that the charter of Charles II. is granted to *another* body, and not to those who either actually were the corporation before, or who claimed to be so afterwards.

The first replication states, that Charles II. reserved to himself, in the constitution of this new body politic, the power of removing one or more of every description of officers, of which this corporation consisted; and it is stated, that they shall be removed to all intents and purposes, whenever that motion is signified, by the order of the king, in council, without any further process. It then goes on to state the number of corporate officers then in being, and that there was an order of king James, in council, for the removal of all those officers; the signification of that removal, and an averment, that the power of electing aldermen consequently ceased.

When I consider what learned persons were engaged in the conducting this cause, and in putting these different matters upon record, and how able they were to judge of their legal effect, I cannot help thinking that my learned friends, on the other side, finding themselves beaten upon the facts, upon which alone they intended to go to the jury, come at last, by a motion, to the court (as on a forlorn hope) to deliver the *posse* to the defendant, when upon each of the grounds upon which that motion is made, there might have been a demurrer upon the record.

If Mr. Bower's ground of applying upon the defect of the first replication is a just one, there never was a clearer case of demurrer than to that replication. Mr. Bower moves upon this ground—that this act of motion was not justified by

the charter, and therefore that the corporation was not dissolved by that motion; from whence I apprehend he means to say, that although it is an motion *de facto*, it is not an motion *de jure*; that the corporation still existed; and existing, that there could be no charter restoring the antient one; that is to say, that the restoring and pardoning charter coming subsequent to the time of the grant of Charles II. an motion *de facto* was not an motion *de jure*; that the new corporation still existed, notwithstanding that pardoning charter, and exists at this day.

It will be necessary first to consider what the king intended by this power of motion, and then we shall see what will be the effect of this grant, provided it appears clearly that the crown did mean to reserve this power.

The intention of the king can be got at only in two ways: First, by the words of the charter; and secondly, from what the king has in fact done in consequence of that power reserved to himself and in corroboration of that grant; always taking it to be the grant of, and construing it most strongly for, the crown, as differing from the grant of the subject.

With respect to the words of the charter, it can never be said that it does not extend this length. The king reserves to himself the power of amoving *one or more* of each description of officers, constituting this corporation; and the only argument which can possibly arise upon the wording of this charter, whatever may be the construction of it, is—how the places of those persons put out shall be supplied.

The charter points out, that others shall be elected, which seems to imply (as my friends will no doubt argue) that the king never meant to extend this power so far as to take away the possibility of a renovation and a re-election. When I am stating that construction, I am stating, as powerfully as I can, the argument of my adversaries.

In answer to that, I say, that though the king reserved to himself the power of amoving all, yet as there might be cases in which his majesty might not think it necessary to extend that power to the utmost, it became necessary for the king in wording the charter, in *cases which admitted of a new election*, to state how that election was to be made, for it did not follow that because the king reserved a power of amoving all, he, in his own mind, intended to amove all. Many cases might arise in which he might only wish to amove one or two; or to amove such a number short of the whole as would admit of a re-election, consistent with the charter. Then the king means only to say this, "When I amove one or more" "I do not reserve to myself the power of nomination; and I do not mean to contend, that by the same power, which enabled me to remove those persons, because they displease me, I can nominate, by my royal authority, others because they do please me." The power is not reserved to that extent, but a power is reserved to the king of removing one or more, who may meet his royal displeasure, without stating any cause of amoval; in which case it was absolutely necessary, whenever the king exercised his power, short of its greatest extent, that he should point out, by the words of the charter, how that re-election should take place; consequently, your lordships see that the wording of the charter, stating, that when one or more are amoved, it may be lawful for the rest to elect others in their room, is not inconsistent with the construction I am contending for; for I admit, that if power is granted by the king, for the corporation he had erected, to appoint and elect others in the room of those he amoved; and if it be found repugnant to, and inconsistent with, the reservation, it might affect the whole grant, because the king would have been deceived, at least it would be strong against my argument; but I conceive it to be perfectly consistent with the reservation, in the extent in which I state it, because, though the king reserved a power to that extent, he did not mean *always* to exercise it to that extent.

The next point then is (still carrying in your lordships' mind, that this, as the grant of the crown, is to be taken most strongly for the crown) what is it that the king reserves? He reserves to himself the power of removing one or more. Now he certainly can remove the mayor; he certainly can remove an alderman; he certainly

tainly can remove one, two, three, or four, aldermen. Where is to be the limitation? I know very well where the limitation is to be insisted upon on the other side; that the *ne plus ultra* is an exercise of that power consistent with the re-election of the corporation; that, I take it for granted, is my adversary's argument, though I have not yet heard it; but as there is no inconsistency (for the reasons I have just now given) in allowing the right of re-election, notwithstanding the power be reserved to the utmost extent; then it is fastening a limitation upon the crown, by implication and construction, narrowing the words of the king's royal grant, and taking them most strongly against himself, as if it were the grant of a subject. For the king does not say, he reserves to himself the power of removing one or more, *so as the number removed shall not tend to dissolve or extinguish the corporation*; therefore I contend that when the king reserves to himself the power of doing an act which, if done to the extent, within the reservation, tends in its consequences to an annihilation of the corporation; he tacitly does reserve to himself the power of extinguishing that corporation; for I take for granted that nothing can be more clear in law, not only as applicable to corporations, but to every other subject, that if I reserve to myself the power of doing a thing, which it is legal for me to do, without stating what the consequences are to be when the thing is done; whatever be the consequences which follow in law, I have a right to do it. Therefore you are about to fasten this constraint upon the king's grant (without precedent) namely, "That he shall remove one or more, so as the number removed shall not tend to the extinction of the corporation," by an extremely forced construction, unless the king *actually did* limit himself never to exercise that reserved power to such an extent as to render that re-election impossible. By such a construction you not only take the king's words most strongly against himself, but deprive him of the benefit of the letter of the grant, and do that against the king which you would not be warranted to do with respect to the subject. For if I, a private man, grant any man a franchise, a privilege, or property, reserving to myself a power of doing an act, which, if I do it in the extent in which it is reserved, defeats many valuable privileges, he must take all the consequences together, provided my reservation is a *legal* one; if so, and if the construction I put upon the clause be a just one, there is then an end of the question; for the king has reserved what was lawful for him to reserve, and he has executed the power reserved in such an extent, as by law puts an end to the corporation. Then the conclusion drawn upon this replication is a self evident proposition, namely, that the power of electing aldermen ceased.

If on the other hand it be argued, that it is an *illegal* power (taking it that I am right in the construction I put upon the power itself) then it comes to the same point, the king is deceived in his grant, and *the whole is void*. I never met with, in the course of my studies, so complete and logical a dilemma as exists in the argument upon both these replications: either this is a *legal* or an *illegal* grant; if it be a legal one, as the record expressly avers, the exercise of this power, by the crown, to the complete extent of what was reserved, undoubtedly puts an end to it that way; if on the other hand it be an illegal grant, then upon the authorities I am about to state, the king being deceived in his grant, the whole is void.

It would be wasting your lordship's time, I apprehend, if I were to go into the detail of a great number of cases, to shew that wherever the king grants an impossible estate; that is to say, when he annexes a condition in fact to any grant, which condition is an impossible condition in law; it is not taken most strongly against the king, as it is in the case of the subject, but because the king is deceived in his grant it is void.

If a man grants lands and tenements to another, and his heirs male, he takes a fee; for it is not limited out of what body they shall come: and although there is nothing said of females, but that it is heirs male, and that the intention of the party was most evident to grant an estate tail; yet in a deed where all precaution is to be taken as opposed to a will, as he does not state the body out of which this is to proceed, he takes in fee. But, says lord Coke, "Such a grant from the king is void;

void ; for if there be no such estate as the king intends to grant, the subject takes nothing, for the king is deceived, and he shall not be intended to part with the fee."

What is the principle upon which this proceeds ? It is this :— that the king has nothing to grant of his own. All his prerogatives are trusts for the public benefit ; and the public are interested in preventing the king from vesting those things which are not his own to give away. The king's prerogatives must not be taken away by implication ; and in every case that can be stated, wherever the king annexes a condition in fact, which he cannot have in law, it shall not be said, " You ought to have foreseen you was granting something to which you have annexed a condition ; which condition the laws, as administered by your judges, will not give effect to." No ;—the law is for the protection of the subject, because the king has nothing to grant of his own, but for the benefit of the subject as trustee of the nation :—his grants are absolutely void if he does not foresee all the legal consequences of them. This power expressed in the letter of the charter, is to amove one or more, *without limitation* (for my learned friends are to raise up a limitation out of the other words) and your lordships are not to restrain the king's grant, unless it appears you are bound to do it by the letter.

Then we have but one question more : the *intention* of the grantor ; *that* is shewn by the exercise of the reserved right. The king *does* amove all, he amoves *every one* of the corporation ; and he must be supposed to do it under the power reserved ; for it is done by the very instruments and in the very manner expressed in the reservation—by the king in council. The intention is shewn by the act ; it is shewn farther by the submission of those on whom it is exercised ; they submit—there is an amotion *de facto*—and for the reasons I have given, it is an amotion *de jure*. It is stated upon the record, they never assumed any thing under the charter of Charles II. after they were amoved ; the power is exercised in its full extent, and submitted to ; why then, as far as this replication goes, it certainly (if I am right) makes an end of this question, because the defendants, Amery and Monk, state themselves *now* to be elected, one an alderman, the other a common-councilman, under a charter of Charles II. which was extinguished and dissolved at the time of their election.

Repetition is at all times nauseous, therefore I shall say no more now upon the subject of this replication ; but I may have occasion to mention it by calling it in aid to the second replication, not that I think the second replication will at all want it—but it is to be seen, whether, upon the whole of this record, the defendant has made out his claim against the crown ; for your lordships observe, this does not come before you regularly upon a demurrer to the first and the second replication ; but Mr. Bower, with this record in his hand, asks your lordships, notwithstanding the issues found as they are upon this record, not to give the crown the legal effect (as I contend it is) of the finding, but to deliver the *posse* to the defendant. Whatever, therefore, I can find upon the face of this record, which distinctly cuts down the title upon which the defendant stands, to protect himself against the ouster sought by the information, I am undoubtedly entitled to avail myself of ; but the second replication, I think, stands in need of no such adventitious aid.

I said in the beginning, that Mr. Serjeant Adair's argument, which was certainly very able and comprehensive, went to no point that was irrelevant, but to matter that I contend was unnecessary ; but though I might think it unnecessary, seeing in so forcible a light as I do, the strong ground we have upon this record, yet certainly it would be *laches* in me if I was not to enter my protest, as I do most solemnly, against any forfeiture being possible by the law of this country, in an information in the nature of a quo warranto, against a body corporate, *quasi* a body corporate, and not against the *persons composing* that corporation ; I mean, such an information as it appears upon this record, sir Robert Sawyer filed.

Secondly, I say, if that question were to be decided against me (and I think I shall shew your lordships some reasons why it ought not) that at all events, there can be no final judgment in an information in the nature of a quo warranto against a corporation,

corporation, whether proceeding against the persons by name, or proceeding against them as a corporate body, *until the appearance* of that corporation, because it is a personal action. There can be no judgment but upon appearance, and there can be no process to compel an appearance, but by distress and outlawry, which cannot take effect in the case of a corporation.

Thirdly, I say, that if unfortunately your lordships should be against me upon both these points, it appears upon the face of this record, that Sir Robert Sawyer's information was totally false and unfounded, and that a judgment *quousque* not followed up by a seizure, *does not even suspend* the functions of a corporation, and that the corporation cannot be called upon, even to replevin those functions, but that there *must* be a seizure in consequence of a judgment; for the very term replevy plainly means, that it is to restore something again which has been seized.

All these propositions, I conceive, I shall be able to establish by the clearest authorities, and all the analogies of law and justice.

With respect to the first—I hope I do not go too far when I say, that the judgments and opinions of the judges in the reign of Charles II. and James II. upon the subject of quo warranto, unless as those judgments and those opinions are supported by other precedents of law in former times, and since the revolution, do not weigh a feather in the scale of any argument that can be offered to a court of justice at this day. For though some of those men had great learning, and where the crown was not concerned, their judgments may deserve as much weight as others, yet by their wicked doctrine and conduct in cases of quo warranto, they became the disgrace of the administration of this country, and, I may say, of the country itself.

It will never be said, that an acquaintance with the history of our country does not illuminate the mind of a lawyer and a judge. It can never be said, that upon great and important constitutional questions, a man can deserve the title of a lawyer who does not add to the critical knowledge of his profession, the history of those great causes which have produced its laws.

Who does not know that the judgment of the court of King's-bench, in the quo warranto against the city of London, was brought about by the personal interposition of the king himself, with the judges who composed that court? I do not speak from the lying pamphlets of the times, or from those reports which may be brought forward by faction against the reputations of individuals, but I speak from the most authentic documents this country knows—the records of parliament. Who does not know that those judges were sent for to the house of commons after the glorious revolution, to account for their removals, that it might be seen whether there was a foundation for the impeachment of those wicked ministers who had dared, without cause, to remove the ablest servants of the crown?—to remove those learned judges! I have the debates of the parliament of those times, where it will be found, that Atkins, Mr. J. Dolben, Mr. B. Neville, Mr. J. Powell, and Mr. J. Gregory, were summoned by the house of commons, to shew the reason of their removal from their respective offices (and it is a libel almost upon the government of the country to read this) one of those learned and excellent judges says, “He was sent for by the king, who put a paper into his hands, and wanted him to find law for *that*.” Mr. Justice Dolben says, “That the king sent Secretary Jenkinson to him, and told him, if he did not do as the king desired him, he must remove him from the “King's-bench.” The next day his docket was struck—(it is in Grey's debates, and in the journals of the house of commons.)

Being summoned to shew the reason of their removal, with one voice they declared the personal interposition of the sovereign in every one of those cases of quo warranto which disgraced that reign; and we all know, that Chief Justice Saunders was placed in that situation, to pronounce this notable judgment against the city of London; but his faculties, which I apprehend every man is bound by the great charter of nature not to misuse, were seized and taken away by a superior power for *misuse*; and he was not permitted to pronounce that judgment!

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In the great argument in the case of the city of London, it is asserted by fir George Treby, who was then at the bar, that dissolving a corporation by a judgment of law, was a thing that never came within the compass of any man's imagination till then; and he states what appears to be true by Finch's argument, that fir Robert Sawyer and he had not been able to produce any one case in which there had been a proceeding against a corporation *quasi* a corporation to do that which was the object of fir Robert Sawyer's information.

I must now turn to the record to see what this information is. I apprehend there can be but two sorts of proceedings against a corporations.

The first is, when a body of men assume to themselves to be a corporation by any given name, where they are not charged in the information with the abuse of any privileges, franchises, or liberties, which the Attorney General takes for granted, did proceed from the crown; but where the charge contained in the information is the *usurpation* of a franchise, that is to say, *usurping to be a corporation without any grant from the crown*. Now I say, not only upon every authority in law, but from the very reason of the thing, *that* species of information cannot be brought against a corporation by its corporate name, but that it must be brought against them in their natural persons.

Before I trouble your lordships with any authorities, let us see what the reason of the thing is: why it is in disaffirmance of the corporation—it is to deny that those men do form a corporation, and therefore the usurpation is not of any particular liberties which are supposed to be granted to them, and which they have abused; but that by a particular name mentioned in the information, they assume to themselves the power of being a corporation without any royal grant.

It would be a strange thing to say that a corporation is to be forfeited which never existed!—that an information should be brought for the purpose of forfeiting, of dissolving, of extinguishing it!—Why the complaint is, that it *never had an existence*; and that which never existed, can hardly be extinguished!—that which never had a being, cannot be dissolved!—that which never was granted, cannot be the subject of forfeiture! It is therefore brought against these men in their natural persons, calling upon them to shew a royal grant; and it is a complete answer to such an information, to shew that there *is* a royal grant.

This being the reason of the thing, observe what is said by fir Robert Sawyer himself in his argument: he says, “Where it clearly appears to the court, that “when a liberty is usurped by wrong, and upon no title, either by the king's grant “or otherwise, there judgment only of ouster shall be entered; but where it appears, that the king or his ancestors have once granted a liberty, and the liberty “be misused, judgment of seizure into the king's hands shall be given. These “rules carry their own light with them; that which came out of the king's hands, “as Bracton useth the word, is properly returned there again by seizure, or as our “ancient books phrase it, by re-seizure. But that which never came thence, but “is merely usurped upon him, shall be vacated, and by judgment of law declared null and void.”

So that your lordships observe, there can be no judgment of seizure against a corporation, upon an information which only charges that it has no royal grant for its foundation, because the foundation of the information is, “That it never came “from thence.” In the language of fir Robert Sawyer, that the king never granted at all, and consequently it would be absurd to say, that that shall be seized which never existed: he says, “There is another; that is, where it is doubtful to the “court, whether the liberty commenced by grant, or by wrong, that for the uncertainty, the best and safest course is to give judgment of seizure.”

Now in the case in Pollexfen's argument, where he appeals to lord chief justice Hale's common-place book, where it is expressly laid down, page 68:—“I do “agree,” says Pollexfen (for he was pressed by Sawyer, with several cases having been brought in the nature of *quo warrantos* against corporations, *quasi* corporations, although it charged them with usurping upon the crown without royal grant; to which

which he says) "I do agree, that there are precedents in the crown office of quo warrantos brought against corporations in such manner as this is brought, for usurping to be a corporation, and to claim divers other liberties; but they are for me, and not against me: first, for that they all being for claiming *other* liberties, as well as to be a corporation; and being good and sufficient as to the other liberties and privileges, that the corporation claims, though insufficient for this claiming to be a corporation, they must be proceeded upon, if the attorney pleaseth. But is any to be found where only the claiming to be a body politic, and nothing else; or if other things questioned, yet only proceeded in as to this particular of claiming to be a body politic, as in this case, that will be like?"

Now I challenge my friends to produce one case in the whole law where there is an information in the nature of a quo warranto against a corporation *quasi* a corporation, which does not charge the misuse or abuse of liberties which are taken for granted to exist; but when the charge is singly that of sir Robert Sawyer's, namely, that it usurped to be a corporation without any royal grant, that there it must be in the language of chief justice Hale's common-place-book. It being brought in dis-affirmance of the being of the corporation, therefore there must be set up somebody capable of being a defendant in such a suit, that is *particular persons* who ought to have been named, as was in the case of *Cusack*.

These are the most solemn determinations of law, and in this case it is asserted both by sir George Treby and Pollexfen, that there never was such an instance. They are so far from being contradicted by the attorney and solicitor-general, that they agree that there must be judgment of *ouster* in all those cases as opposed to *seizure*, which is, where there has been a right granted, but that right has been abused.

It would be to pronounce a libel upon the court (which God forbid I should be daring enough to imagine, much less to express, if I were to imagine) that your lordships do not lean with all the weight of your minds against giving effect to this charter; for this information filed by sir Robert Sawyer, is false upon the face of the record.—But let me observe, that there is a previous averment upon the record, that Henry VII. granted letters patent to this corporation by the name of the mayor and citizens of Chester, that that charter was confirmed by queen Elizabeth, and that these charters were in force at the time sir Robert Sawyer filed his information. The replication goes on to aver, that at the time sir Robert Sawyer filed this information against the city of Chester, they *were* a corporation, not *usurping* to be a corporation by the name he charges them to have usurped, because it appears they existed as a corporation under the grant of those former kings.

Then he does not charge the city of Chester with having abused any of those liberties which would make the judgment of seizure a proper judgment, if he had filed his information in the nature of a quo warranto against the mayor and citizens of Chester, setting forth the causes of forfeiture upon the face of the record, and if without charging them barely with an usurpation upon the crown, he had taken it for granted that they were a body corporate by the name in which he addresses them in his information, and had accused them of specific abuses of those liberties granted them. Then we shall see what would have been the consequence of their not appearing, and if there had been a final judgment, what would have been the consequence of that final judgment.

But before we come that length, it will be seen upon the authority of Hale, and the admission of Sawyer, upon the quo warranto against the city of London, that there could be no judgment of seizure upon this information, *whether they appeared or not*. There might have been a judgment of *ouster*, but there could be no judgment of *seizure*, for the foundation of the abuse is a usurping upon the crown without a royal grant.

I will now state the history of this proceeding. It is very well known, that Charles II. before sir Robert Sawyer filed this information, had asked the city of Chester (and that will give your lordships the history of this supposed nonappearance) to surrender their charters of Henry VII. and Elizabeth. They stood out
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and refused to surrender them. The king having no charge to make against the corporation of Chester, so as to state specific abuses of liberties then existing and notoriously known to be existing upon the record, was obliged to make this sham sort of proceeding by sir Robert Sawyer. The governing part of the corporation being in the king's interest at that time, they of course, in order to serve the king, did not chuse to enter an appearance, whereas other persons (and among them the seven worthy men excepted in Charles's charter) stood out and refused to surrender. And this is perfectly clear. Colonel Whitley said, in his place in parliament upon the 22d of February, 1689, after the revolution, "I know not what reward others have had, but I —"

Mr. Justice *Grose*. Can we hear that in argument?

Mr. *Erskine*. I only mean to say this, that it so far throws light upon the subject, that he then stated himself to be an alderman, and "he would not surrender the charter of Chester." If the court do not chuse to have light thrown upon it from those sources, that record furnishes sufficient.

If there could be found to be a charge of usurpation of any one liberty not before granted, then it would be one of those mixed cases mentioned by Pollexfen, where there is not only a charge of usurping upon the crown without any grant, but for taking more than the grant gave you, or abusing what was granted; there may be a judgment of seizure because you are taking something which the crown has granted in a manner not granted. "You are a corporation, you exist as such, you have specific liberties granted by the charter, but you either usurp upon the crown by taking more liberties than you are entitled to, or else you abuse those to which you are entitled;" in either of these cases the judgment is seizure of the corporate franchise, but where *the whole* is stated to be an usurpation, there the information must be (upon every authority in the law) against the *individual persons*, but not against the corporation, for it is to disaffirm that there is any corporation existing.

I desire that this record may be inspected. That the name by which this corporation was created by the charters of Henry VII. and Elizabeth may be looked at, that what was granted by one and the other of those charters may be also noticed, and then it will be seen that the only charge made by the attorney-general against the corporation of Chester was, that the persons composing it claimed to be a corporation under the name by which they were incorporated, and that they usurped upon the king without royal licence and authority, in using the liberties granted to them by those antecedent charters. Then it is to *disaffirm that it is a corporation*; it is not to admit that they were such, not charging them with the *abuse* of any thing granted them or claiming powers *beyond* what was granted them, but the very gist of the proceeding is an *usurpation upon the crown*. The judgment can only be *ouster* upon that information as it stands upon the face of the record, even upon the authority of the case of the city of London, if it had been followed up by a *final* judgment after an appearance. It is *no judgment*, and would be reversed upon error; and it was reversed for such an error in the Malmesbury case. I defy any man to shew what other error did appear, even where there was a final judgment, than this which is stated by Hale, by Pollexfen, by Treby, and by the attorney and solicitor-general.

In the Malmesbury case in the same year, (and this is taken from the record of that case) there was an information against the corporation, by their corporate name, for claiming to be a corporation. Now that we may assimilate the two cases as we go along, is not this information of sir Robert Sawyer such an information? Is it not calling upon the city of Chester to answer for an usurpation upon the crown without a royal grant by the name of the mayor and citizens of Chester? for usurping upon the crown those liberties and privileges which the record states to be granted by former charters?

There was a judgment *quousque* for want of appearance. Afterwards, upon Monday next after the Purification, in 1st James II. (which shews how the crown ought to give

give ultimate effect to its *quousque* judgment) Sir Robert Sawyer, the attorney-general, informs the court that the defendant had not appeared to replevy, and therefore he comes to give effect to his *quousque* judgment. First of all, there was a seizure, which is the execution upon that judgment.

Mr. Justice Grose. Was there a writ?

Mr. Erskine. A writ of seizure, most unquestionably.

Mr. Justice Grose. Where do you find that?

Mr. Erskine. Not upon the face of the record; but there must be an execution of the judgment. I do not chuse to break in upon that part of the argument at present.

Sir Robert Sawyer, having prayed judgment that the liberties may be seized as forfeited, final judgment was given "that the liberties be seized, and that the defendants do not intermeddle therewith, but be wholly excluded therefrom." But upon the second of January, 1 W. and M. there was a writ of error in parliament brought by this very mayor, aldermen, and burghesses of Malmesbury, who were not really excluded by this final judgment from their liberties.

Mr. Justice Buller. Where do you take that from?

Mr. Erskine. We have the record of that case in court. There were general errors assigned; assigned by whom? by this very corporation, in its corporate name and in its corporate capacity, notwithstanding this final judgment of exclusion from intermeddling with their liberties! And upon that writ of error the judgment of the King's-bench was reversed.

The record was in court—no evidence could possibly be adduced upon a writ of error. And I will ask your lordships this question, Whether it be possible to discover any one error upon the proceedings in this record, but the error which I venture to assign? namely, that there could be no judgment of seizure against a corporation, proceeded against in its corporate capacity, and not against the persons composing that corporation, for a usurpation upon the king, without a royal grant; for that the judgment should have been *ouster* and not *seizure*. There every thing was regular—as in this case every thing is defective, informal, and irregular.—First, there was a judgment *quousque*; then (whether it is to be taken that there was a writ of seizure or no) Sir Robert Sawyer, to give effect to the judgment *quousque*, prays final judgment of *exclusion*, which marks that they were not excluded from their liberties by the former judgment *quousque*.

There is no doubt that a corporation may be forfeited as against natural persons. If natural persons will abuse liberties granted under a charter, it never was denied but that those persons may be deprived of their franchises in that corporation; and in consequence the corporation will become extinct; and therefore, though a corporation cannot be directly, it may be indirectly, forfeited; for though you cannot attack a corporation, *quasi* corporation; yet, if there is an abuse of liberties granted by the crown, the natural persons may be divested of the exercise of that usurpation; because, though it is absurd to say that there shall be a judgment to seize that which the crown never gave—to take away that which had no existence; yet, if the king grants any thing that is abused by natural persons, he may take it back again, and then the judgment is of *seizure as forfeited*. Upon the whole, that which must make your lordships lean very strongly (though I cannot ask any leaning that is not consistent with the strict rules of law) against this charter of Charles II. is, that, without troubling your lordships with any part of the history of those worst of times, you have the attorney-general himself filing an information, bad in form, but even if it were good in form, falsified in substance upon the face of this record, for the purpose of extinguishing a corporation which then had an existence, by getting the governing part of the corporation, who had the care of the common seal, not to enter an appearance.

The first proposition then is, that no judgment can exist at all as a forfeiture against a corporation.

Secondly, that a judgment of seizure cannot exist in this case.

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Thirdly,

Thirdly, that there can be no judgment in an information in the nature of a *quo warranto*, against a corporation *quasi* a corporation (though there might against natural persons) without any appearance entered into by that corporation.—And,

Fourthly, that supposing the judgment to be valid, it could not suspend without an actual seizure in consequence of it.—And then,

Lastly, supposing it to be a suspension of the functions of the corporation, it was not a dissolution of it; not such an extinction of it as enabled the crown to make a new grant, in derogation of what it had before granted, by investing with similar liberties, other persons beside those contained in the first. And it is admitted (and so I may save myself the trouble of arguing upon that point) that two corporations cannot exist at one and the same time, in the same place.

As to the second proposition, your lordships will find, in page 16 of sir R. Sawyer's argument; and throughout the whole of it, indeed, he always speaks of a *seizure*, and not of a *judgment to seize*; he says, "Where seizure is by award of a court, for a contempt in court, the court may admit the parties to affix and order restitution." Now there is not a word said, in the whole of the argument, of a restitution after a judgment, that the thing *may* be seized (I mean to contend that there can be no such thing) but after the *actual seizure*. "So, where by award of the court, in default of appearance at the king's suit, a seizure is made, which is in the nature of a distress, to bring in the party by putting him out of the possession of the liberty till he appear and replevy, the court will deliver possession upon replevin"—but not upon a judgment by which a thing *may* be seized, *not carried into execution*.

I am quite indifferent, whether upon the judgment of seizure there is to be a writ of seizure, if there be not an actual seizure in consequence of the judgment. *If there be no seizure in consequence of that judgment, there can be no replevin; for the replevin, in every case, is stated to be where a seizure is made in the nature of a distress.* Now, a judgment which intitles any officer of justice to enter and seize my goods, unless he *does actually* enter and seize my goods, can never give rise to a replevin. A replevin is to give security that you will prosecute your claim upon getting back again that which has been seized; and upon appearance, after seizure made, if you demand to replevin, the judges shall deliver back the possession of the liberties, &c. So that in every one of those cases put by sir Robert Sawyer (and I shall confirm them by other authorities) there is a seizure supposed to be made; *but in no one instance can a replevin take place without something being done in consequence of the judgment quousque.* But I am now upon this part of the case in which I mean to say, that there can be no such thing against a corporation, unless they do appear.

Your lordships will find, in 1 *lord Raymond* 17, that "A judgment ought to be complete and formal; and therefore, if a *quo warranto* be brought for usurping royal franchises, and the court give their opinion that the defendant has no title to them, unless they proceed to say *ut abinde excludatur*, it avails nothing." Now this is exactly such an information as is stated in *Raymond*, for it is for usurping real franchises without any title from the crown; and here is no judgment *ut abinde excludantur*.

Your lordships will find, in Jenkins's reports, 141, the strongest case which I think can possibly be cited:—"A *quo warranto* is brought in the king's-bench; the defendant being summoned, makes default, and another default at the return of the *venire facias*, judgment shall be that the franchise shall be seized into the king's hands, and not that it shall be forfeited; for it does not yet appear whether there is a cause of forfeiture; and no man shall finally lose his land or his franchise upon any default, if he has never appeared."—"By the judges of both benches." And my lord Holt is made to say, that there is no way of compelling a corporation to appear, but by seizing its goods in the nature of a distress, until it does appear. Against natural persons you must proceed by outlawry, but a corporation cannot be outlawed, and therefore you must proceed by seizing that which the corporation has.

In the 21 *Ed. 4, plac. 70*, it is said a corporation can only be made by the crown. lord Holt says in 2 Shower, 276, "I do not think a judgment of seizure, where it is a final judgment, to be ineffectual; and the judgment of seizure *quousque* for non-appearance proves it." But lord Holt no where says that a judgment *quousque*, where there has been no seizure in consequence, does put the corporation out of the possession of its liberties; nay, it will appear to be admitted upon the very face of this rejoinder, that it does not, for the contention is merely that that is effected by the *final* judgment. Your lordships will find that this is the rejoinder; "And that the said mayor and citizens (stating the final judgment) be excluded and removed therefrom; the record of which last mentioned judgment is lost or destroyed. And the said Thomas Amery says, that by reason thereof (that is, by reason of the final judgment which they aver, and the non-existence of which is found by the jury) the said community, or body corporate, became and was totally dissolved and destroyed."

Now if they had *lost* their liberties before, it would not have been necessary to aver that this happened in consequence of a *final* judgment; but it says, by reason of this *final* judgment, this corporation became dissolved: whereas, if it had become dissolved by the operation of the *other* judgment, it could not be dissolved by the operation of the final judgment; for a thing cannot be *twice* dissolved.

But I mean to contend that there is no pretence for saying that there was any *suspension* of the functions of this corporation at all: there was a judgment for non-appearance, that the liberties shall be seized into the king's hands until the court shall further order. Now I wish to ask my learned friends on the other side, whether it appears upon the face of this record, that that judgment was carried into execution? or whether it does not appear upon the face of the record, that they continued in possession of their liberties, notwithstanding the judgment, that they should be seized till further order?

The final judgment, if it had existed, would have been, *that they should not intermeddle with their liberties, but should be from henceforth excluded therefrom*. So it is in the other cases. In the Malmbsbury case, the attorney-general prays final judgment, and that they shall be utterly excluded from their liberties, because they had not come in and replevied: there must be a *seizure* before there can be a *replevin*.

I hope a judgment and an execution will not be confounded together as the same thing. A judgment that the thing shall be seized till the court gives further orders, that, *pro tempore, if carried into execution*, puts me out of my liberties. Why then there is a suspension of my functions until I come and give security or enter an appearance; and then, says sir Robert Sawyer, I am entitled to replevy the liberties: but can a thing be replevied that has never been seized? I apprehend the very term *replevy* carries with it, not merely a judgment that the thing *may* be seized, but an *actual execution* by which it is asserted it *has* been seized; for there were no *laches* in this corporation at all, unless there was a seizure following this judgment; they have no notice of the judgment, and so there is no appearance.

Now, for argument sake, suppose it was a good information, *non constat*, that they had any notice of what passed in court—then they enter no appearance—he prays a judgment *quousque*. What is that? Why, that the liberties of this body shall be seized into the king's hands, for their contempt in not appearing. Why, then *before they have any signification* of the contempt they have incurred, before your lordships can suppose them ousted from their liberties and franchises, you must see some effect of that judgment.

The attorney-general, by having obtained the judgment *quousque*, was put in a condition to seize them, and in the Malmbsbury case he did seize them; and when they were not replevied upon the seizure, he prayed for final judgment; and so in all those cases put by sir Robert Sawyer, in the 16th page of his argument, he proceeds upon an *actual* seizure. Will it be said, that in looking into a law book, when we see where seizure *is* made, your lordships will confound that with a judgment by which a seizure *might* be made? or whether, when the book says, where a

seizure is made, the party shall come in and replevin; the meaning of the term replevin must not be, that there must have been a seizure?

Now as there was no seizure under the judgment *quousque* averred upon the face of this record, your lordships cannot possibly say that there ever was any suspension at all of the functions of this corporation. It is admitted they were not forfeited, because final judgment alone can forfeit; a judgment *quousque* can never be a forfeiture, for it is only a *disfringas* for non-appearance—it is nothing more but in the nature of a distress, and so it is put by sir Robert Sawyer; from hence the word *replevin*; and that is the reason why liberties may be replevied; they are not tangible substance; but yet the word *replevy*, which is to *take back again*, is made use of in the terms of law, because a seizure is in the nature of a distress; therefore, as there is no averment upon the face of this record, that there was a seizure of the liberties of the city of Chester, in consequence of this *quousque* judgment, there was no *laches* in them for not replevying, they had no notice of the judgment, there was nothing done in consequence of it. The *laches* were on the part of the crown, and not of the city of Chester.

If in consequence of the contempt of the city of Chester (supposing the rest of my argument ill-founded) the crown had a right to follow up the *quousque* with a final judgment, and does not follow it up with a final judgment, in consequence of contempt for a non-appearance, they must at least carry that judgment into effect, there must be a seizure of the corporation's liberties, that is, a suspension; for a seizure *quousque* is not a forfeiture, because it may be redeemed and replevied.

If it had been averred on this record, that a final judgment had issued, that there had been a suspension, then my friends might have argued what would have been the effect of that; but I will not take for granted that there is a suspension of the functions, till I see some act averred upon the face of the record to be done by the crown, which did suspend the functions. I admit the crown has a power to do it by a legal judgment, which legal judgment, in the Malmesbury case, was carried into farther effect by a seizure most undoubtedly, and by the attorney-general, having got possession of the liberties into the king's hands, in consequence of the seizure upon the judgment *quousque*; and upon stating to the court that there had been no replevin of those liberties, he prayed a final judgment that they might never take them back again. Therefore, what I mean to say, is this; that unless it appeared upon the face of this record, that the crown carried into execution the judgment it had obtained against Chester, for non-appearance (taking for granted, that an information of this nature will lie against a corporation by its corporate name, and that an action may proceed to an utter exclusion from their liberties before appearance—which I object to) it must still appear that the crown has gone on with its suit. Now may the crown abandon its suit?—That is admitted upon this record; for it has not gone up to final judgment, it never went beyond the judgment *quousque*, the crown never took final execution upon that judgment.—It never did seize the liberties.

Mr. Justice Grose. Have you looked whether there ever was a writ issued upon that interlocutory judgment? or do you know, in point of fact, of any writ having issued? or do you mean to say, that without any writ of execution, the king might in fact seize the liberties? because I am puzzled about that.

Mr. Erskine. By what form of writ the king does seize those liberties I am not able to acquaint your lordship. I do not find any particular form of writ by which the king carries into execution the judgment *quousque*; but this I find stated as a fact upon the face of the record, that the king had seized. Now the question will be for your lordships, whether or no a mere judgment, which authorizes the seizure, can be called a seizure? or whether or no the mere judgment of seizure, upon the records of the court, can oblige the party to come in and replevy, before the king has done any thing in consequence of that judgment?

I apprehend the very term *seizure* is different from the judgment by which the thing may be seized, and that the word *replevy*, *ex vi termini*, does imply, that
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some *actual* execution of the judgment has been taken, inasmuch as I cannot replevy till something is taken out of my possession which I had before. Now the judgment of the court is, that they *shall be seized*, not that they *are seized*.

Mr. Justice *Albhurst*. But by what means can you seize a *non-entity*? you say this is a non-entity, there being a corporation.

Mr. *Erskine*. The course of my argument, if I make myself understood, is this, I say it is a non entity, and that is the foundation of my first objection; but supposing your lordships should be of opinion that that is not an objection, as these people had a royal grant, and that this information is a good one; but that it is a contempt of the king's authority not to enter an appearance to the king's information, even though there was no foundation for the information—supposing a corporation, in this form, to be amenable to justice, as a corporation, and though they may have the most perfect case to lay before the court, in answer to the information, yet that if they do not come in to plead, the crown is intitled to a judgment of seizure, that is, to seize the liberties and franchises which this corporation enjoys; and they must come in and replevy: still I contend they are not called upon to come in and replevy, till the crown has done something in pursuance of this.

Mr. Justice *Grose*. These franchises are undoubtedly incorporeal hereditaments; they cannot be taken as any thing corporeal can; there is a judgment of seizure of those franchises. From the moment of time that judgment passes, without any actual writ of execution, do not those franchises immediately vest, and are they not considered to be seized by the crown? because, were an execution to issue, you could not, in point of fact, seize them; and if you cannot find that any executions upon this occasion have issued, does it not follow that those liberties are considered as seized, and vested in the crown?

Mr. *Erskine*. Suppose it was said in any law book, that my property might be seized by the judgment of the court of King's-bench: suppose it was a question, whether I lived within the jurisdiction of any particular court, and it were to be said, that my property (stating the locality of it) might be seized by the judgment of such a court, it would not follow from thence that it could be seized by the judgment, without the execution of that judgment; therefore I do not conceive it evident that it may be seized without any process.

The last, however, and the most material point is this, whether, supposing that no writ of seizure is necessary, but that as your lordship is now putting it for argument sake (for I am not to presume that what your lordship has thrown out for further argument is at all in the nature of a judgment) that the judgment *quousque* of seizure of the liberties of Chester, till the court should further order, is *in itself* a seizure; that it is not necessary (the hereditaments being incorporeal) that any actual seizure should be made by the officers of the crown, but that the very award of the judgment of seizure gives the whole effect of the judgment, and is in the nature of an execution as well as a judgment, so as to render it necessary for the party to come in and to replevy those liberties, to protect himself from a final judgment.

Then the next and most material question for your lordship's consideration, will be this; whether, when the crown does not take advantage of the situation in which the corporation has put itself by its *laches*, by not replevying these liberties actually put in the king's hands, by that neglect, if the seizure be not followed up by final judgment, the corporation does not remain undissolved (though suspended in its functions for want of replevying) so as to prevent the possibility of re-granting to another body the power which had existed in that body previous to that suspension?

I will not repeat again what was yesterday argued by Mr. Serjeant Adair, that the king cannot grant any thing in derogation from his former grant; and though the king had got hold of the liberties, till something should be done by replevy, yet in that state the king cannot grant the same power to a new corporation, without derogating from his former grant; because—as the corporation still exists—as it is not dissolved—as the king has not availed himself of a final judgment—(sup-

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posing such a final judgment to be legal) then the corporation remains in existence. This seems a strong way of considering it; for if it be true that a judgment *quousque* without any replevy is equivalent to a final judgment; that is to say, if the king, when he thinks the party has been guilty of *laches*, and has not replevied time enough, shall grant to another corporation the power existing in the old, *it never can be necessary to have a final judgment*; for then a judgment *quousque* is in fact a final judgment; for the replevy comes too late after the crown has granted the same power to another corporation.

I will put this case.—Suppose there be a judgment *quousque*, and a seizure, either by implication of law or an actual seizure. *In the very same term* the king chuses to create a new corporation, granting all the powers, while the old corporation is in that state, with its liberties seized into the hands of the crown; then if they come and enter their appearance *the day after* the king has granted a new charter, the court cannot receive it, the corporation is dissolved. The new charter has operated as a final judgment; for, if there cannot be two corporations in one place, then, in order to deprive the old corporation of the power of replevying, the attorney-general has nothing else to do than to snap a judgment upon that old corporation, for not replevying without giving it time to replevy.

Then is the erection of a new corporation, the dissolution of the former? or can the king dissolve a corporation by his own act in derogation of his former grant? There must be some limitation. When is the time within which their liberties are to be replevied? Suppose the king granted a new corporation within the time wherein a replevy might be made by the old corporation, would that corporation be void *ab initio*, or would it only be a good corporation while the old one continued suspended, but to die a natural death the moment the other renovated its powers by doing that, the not doing of which caused the suspension? Then we shall have this strange way of proceeding; the king would file an information against a corporation; for default of appearance and not replevying, there would be a seizure while the corporation continued to exist; for it is not contended that a seizure *pro tempore* is an exclusion from their privileges. It is only a distress; for the language of the final judgment is, *that they shall not intermeddle with their liberties*; but that is not the language of the judgment *quousque*: then this absurdity follows; if this new charter operates in its own nature, as a dissolution of the former corporation, then, in no one instance is it necessary to have a final judgment; and the king can, by his own act, whenever he is disposed to do so, derogate from his former grant, while the former body is still in existence! *That* is repugnant to common sense; either this body must be dead or alive; it would be exactly like suffering the remainder-man to come in possession because the tenant for life was in prison, or under any temporal disability, which *he* might remove; as if he did not enter an appearance to a civil action, and was out-lawed for want of appearance, which out-lawry he might reverse by entering an appearance. If the old corporation still exists, the new charter is in derogation of the former. If it does not exist, the only way by which its existence is destroyed is by the new grant itself, and then it is making that grant operate as a dissolution of a corporation created by the king, without any office found; without any repeal of his former charter, by *seire facias*, or without any final judgment of law, that the persons to whom those liberties were granted should be utterly excluded from enjoying those franchises given them! I confess it appears to me to be an extraordinary argument!

I will now put it another way:—Suppose then that Charles II. grants this new charter, because there is at that time a suspension. It seems to me to follow most clearly, that if this be only a grant, on account of a suspension of the power of the former, the grant can last no longer than during the continuance of the suspension; for if the new grant can operate longer than the continuance of the suspension, it is making suspension and forfeiture synonymous. It is impossible then to say that this charter of Charles II. could be any more than a grant *while those liberties remained suspended*. Then the king can deliver back again that which has only been

been suspended by his own act; if the corporation was dissolved by a legal, final judgment before the granting of the charter of Charles II. then supposing I am wrong in the first part of my argument; namely, if it be true that a corporation can be dissolved upon such an information as sir Robert Sawyer exhibited, then if there had been final judgment upon that, Charles II'd's charter would have been good, and he could not have set up the old corporation again, even though he had extinguished the second charter granted by himself; he could not by any renovating charter have set up that old one; but if it is only suspended, then this pardoning charter operates as a writ of restitution; and you wont set up the statute of limitation against the king himself, when he is the person that restores; will you say to the king, at this distance of time, "you shall not pardon a corporation! you shall not restore it!" the king may say to the corporation, you, after such a length of time, shall not replevy; your suspension shall operate as a natural death if you do not come in within the time; but where the king has never dissolved the corporation by the operation of a final judgment, but its liberties remain seized *quousque*, then whenever the king chuses to remove that suspension, the body renovates, and becomes as it was before.

If your lordships decide, that *in a year* there cannot be a replevin, you create a statute of limitation, which is to operate to destroy that first corporation, and to oust it of all the liberties granted to it, and which were taken away by the information of sir Robert Sawyer, upon facts found to be false upon the face of the record; namely, for a supposed usurpation of charters which are found to have existed, and found to have existed at the very moment sir Robert Sawyer, by his information, was denying their existence.

Lastly, but certainly not leastly, though there has been no dissolution, and though James II. has, by a power reserved in himself, dissolved that very corporation which he had erected upon the ruins of the former (whether legally or illegally, it marked his intention) and when he then renovates and restores that original corporation which had been beat down by the information of sir Robert Sawyer; it will not be contended, that there can be no writ of restitution, and that the king cannot restore at any length of time. Though the corporation (*e converso*) could not seek to be restored, the king may pardon at any distance of time; though a man cannot claim an indemnity at any distance of time (a person can only redeem himself by coming within certain conditions of positive law, or that the reason and analogy of law has established;) yet I never heard that the king's pardon had a limitation upon it, that his benevolence is stopped, if the object of it be still in existence.

The rejoinder most unquestionably shews the sense of those able lawyers who are to contend this matter upon the other side; if they had considered this suspending judgment, for that length of time, to have shut out the possibility of renovation, why did they not demur upon the second replication, as I contend they should have demurred upon the first? why do they with so much anxiety go before a jury to prove the existence of this ridiculous piece of parchment, called a final judgment, which is nothing more than killing a dead man, if for want of replevin upon the *quousque* judgment, the corporation was dead before?

Yet with all their anxiety, diligence, and ability, upon the trial, they did not first demur, but took issue upon the existence of a final judgment. They do not contend, that it was dissolved *before* by the *quousque* judgment, or that the pardoning charter could not set it up again; but they say, "By the final judgment there was an end to the existence of this corporation." And when the jury find that fact against them, they then say, "We must even do without it; we conceived it the *sine qua non* in the business; but now we cannot get it, we must apply to the court, that the *postea* may be delivered to the defendant, notwithstanding the finding of both issues against us, and must say, the pardoning and restoring charter of James II. can have no operation."

It is impossible to argue this point without saying, in so many plain words, that *suspension* and *dissolution* are the same; that the existence and non-existence of a body are

are the same; that while a body remains not absolutely excluded from its liberties, but having a power to redeem them, there is a new statute of limitation imposed upon the crown, that it shall not even grant redemption. I apprehend a more solemn, a more important question, never came before this or any other court; I only say it is less important, because in the happy days in which we live we have less occasion to believe that the crown will abuse any of its authorities; but they are dangerous powers. The king grants them as the trustee for the public, and for the public benefit; when they are granted he is to see by the interposition of his judges that they are duly executed, but he cannot grant them away again because they are not executed perhaps according to his pleasure, although they are executed for the subject's benefit.

There is upon this record not only no finding of an execution upon the judgment *quousque*, but even if it were to be taken to be in itself such without any particular execution, there is no award of a *final* judgment to give it complete operation.

With respect to all the first part of my argument, which denies the possibility of a forfeiture in this mode before appearance, I admit upon all these subjects your lordships will hear a good deal of argument on the other side; they are large and deep questions, and I do not mean to assume to myself any particular illumination about them, so as to suppose I have made any great way with the court.

But where I put my hand upon this record is, the want of that final judgment from which so much was argued, and which from the issue joined upon it, was undoubtedly the sole dependance upon which that cause was tried.

I have had very little time, and but for the assistance of my learned friend Mr. Topping, who sits behind me, and who was so good as to instruct me how to proceed in this business, I should not have been able to have troubled your lordships at all with an argument upon the subject.

Mr. Justice Buller. Have you looked whether such a reservation as this can be supported in point of law?

Mr. Erskine. It is a reservation that never existed before in the history of the country.

Mr. Justice Buller. There is nothing said about it in any book, I suppose?

Mr. Erskine. Not that I find.

Mr. Justice Buller. Suppose the king granted an estate to a man and his heirs, in fee simple, with a contradictory provision?

Mr. Erskine. Suppose the king granted to me and my heirs, with a proviso that if I shall offend him he takes the estate back; then I say the grant is void.

Mr. Justice Buller. I want to see if there is any authority to say whether such a reservation be legal; if it be, then the grant is good for the whole.

I should be glad if the gentlemen who follow you will consider on both sides the pleadings. They are (as you state) very different from what they were upon the last occasion, and I entertain some doubts whether the counsel have not taken greater liberties with the facts than they are warranted to do, because they have stated the charter very differently from what it is; and I don't think it right to garble a charter, and state it contrary upon the record to what it is. They have stated, in setting out this power of amotion, that other persons were to be chosen in such manner as by the said letters patent were before directed. I wish to have it considered whether that replication can be supported at all, for they have not stated in *what manner* other persons are to be elected. It goes on to say, "That in consequence of the order of amoval, the power in the letters patent mentioned as to the 'election of aldermen ceased;' *that* is the conclusion of it. Now I want to know how that can be, when there is an express provision that others shall be elected?"

It says, the charter provides that others shall be elected in the manner therein mentioned, but they have not stated *how*; if the court see that the charter has provided that others shall be elected, how, upon this replication, can they say that the corporation ceased? or that the power of electing aldermen ceased? at the time the order

order of amoval was made, unless the court see upon that record what are the powers of election, and that such power is gone? I do not know how we can pronounce that.

Now there is a case which would certainly be consistent with all that is stated upon this replication. Suppose it happened that by this charter (about which we are left in the dark) the king had said upon removing any of the aldermen and common-council, that others shall be elected *by the mayor and freemen*, and that the aldermen so elected shall have the same rights and privileges as the aldermen appointed under this charter. Now all *that* is consistent with what is stated upon the first replication, and if that be true, so far from the power of electing aldermen under it ceasing, it would continue to this day, and must be exercised according to the clause contained in the plea. You rely upon the second replication, and perhaps you shew your judgment in doing that.

I throw out these observations that the gentlemen in particular who draw pleadings, may attend to them on both sides.

The first replication does not state what the power of the crown was, it only states that James II. according to the power in him reserved in the late charter, removed the mayor, aldermen, sheriffs, common-council-men, and other officers. Now what that power was, or by what charter it was given, is not stated at all in that replication; and if it was a power reserved in a former charter, I should be glad to have it considered, whether such a power could give the crown a right to remove any of the corporators who are created under a subsequent charter without such power of revocation, for if it could not, the court is left much in the dark by this replication, what power was reserved in the king, and by what charter. I should be glad to hear it argued by the gentlemen upon these two rules.

First, each must be construed by itself; and that you cannot crave in aid, matter contained in either of them to make the other good or bad.

Secondly, whether, if the replication is in any respect substantially bad, the whole must not be rejected, and the court be bound to give judgment as if such replication never existed.

Mr. *Erskine*. I rely upon the first replication being a perfectly good replication, it is consistent with the facts as found by the jury, and therefore the defendant can have no title against the crown under the charter of Charles II. because I rely upon this, that whether Charles II. ever did reserve any power at all of amotion in granting the second corporation, or whether he ever did in fact remove them, they go up to the same source, and say, that the charter of Charles II. never had a legal existence, inasmuch as at the time the king made that charter the old corporation was not dissolved: therefore your lordship observes upon the issue of *non concessit*, that it should have been found for us.

Mr. W O O D.

Your lordships will please to favour me on the same side.

THE matter has been so very ably and elaborately argued by the two learned gentlemen who have gone before me, that very little is left for me to say upon the subject.

Your lordship has thrown out something with respect to the pleadings which I was not perfectly aware of before.

Mr. Justice *Buller*. I fancy this replication cost you a great deal of time; there has been a great deal of pains taken with it.

Mr. *Wood*. My learned friend Mr. Topping assisted me in it; he looked into all the charters, and is much more conversant in the case than I am.

I cannot help saying, that I think that this attempt to revive this dormant charter of 37 Charles II. is extremely alarming, not merely to the corporation of Chester, but to a great many other corporations in this kingdom.

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It is an attempt to revive a charter which was certainly granted in the worst and most arbitrary times, and for the purpose of subverting the antient constitution of Chester, which had been enjoyed from the reign of Henry VII. till the year 1684; and as it was restored to them four years afterwards, in the reign of James II. and under which restoration they hold their liberty. The rights of many other corporations in the kingdom stand precisely upon the same foundation. I see one corporation has taken the alarm, and that is the city of York, who stand upon the same footing as the city of Chester; for in that case there was a judgment in quo warranto; there was one of these interloping charters of Charles II. and after that a restoring charter of James II. under which restoring charter, they have to this day held their liberties. But if it can be contended, that the charter which was granted in 37 Charles II. is still in force, it will totally subvert the constitution of that city, and there are many others that stand precisely in the same situation.

I think your lordships, even upon that state of the case, would require exceeding strong reasons before you would adopt the construction which has been attempted to be set up by the gentlemen on the other side; for your lordships will see that it must be attended with very alarming consequences.

Mr. Justice *Grose*. It is not a fair thing to tell the secret about the city of York.

Mr. *Wood*. I mention that because it stands upon the same footing. There were judgments of quo warranto against many other corporations at that time; against York, Thacksted, St. Ives, Poole, Calne, Launceston, another against Malmesbury, and, I fancy, many more.

The first thing I shall submit to your lordships, is upon that replication which states the power of motion in the crown, and also an order for the removal of the aldermen who were elected under that charter.

That replication states the clause in the charter upon which the defendant Amery rests his title, and which clause is to this effect; "that the king shall have full power and authority, at the free will and pleasure of the king, his heirs and successors, the mayor, recorder, common-clerk, or any one or more of the aldermen, common-council-men, sheriffs, coroners, justices of the peace, of the said city, for the time being, by an order of the said king, or his successors, in privy-council made, and under the seal of the said privy-council to them declared, to remove any one or more of them; and that then they shall be removed from their respective offices."

It has been thrown out, that it should have stated in what manner the mayor, recorder, and all the officers, ought to have been elected. Now I apprehend that does appear by their plea, for they have there stated this charter of the 37th of Charles II. and how all the corporate officers are to be elected. They have stated in what way the mayor is to be elected, the recorder, the common-council, and, in short, all the officers of the corporation are mentioned, and the mode of election is mentioned in the plea; therefore it would have been an idle and unnecessary repetition in the replication to have stated that over again.

We were aware that it would be necessary either that it should be stated particularly in the replication, or at least that it should appear upon the whole of the record, and for that reason it was that we wished originally to have had *over* of the charter, and to have set it out exactly; however there we failed; but we were satisfied that upon the plea the election of all these different officers appeared; that the clause upon which this replication is founded, has reference to the mayor, recorder, &c. and that therefore it was not necessary to make any farther allegation, because the court see in what manner these officers are appointed by that charter.

After they are so stated to be appointed by the charter, then is introduced this clause, which shews in what way they are to be removed, and therefore I apprehend that is a sufficient answer to what has been thrown out, namely, that it does not appear upon the record in what manner those officers were to be appointed, because this replication refers to the plea, which states the mode in which they are to be appointed.

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It is contended, that this clause never meant to give the king a power to remove *all* the officers of the corporation.

I apprehend it was inserted intirely for the purpose of giving the king a power of putting an end to that corporation, which at that time he was arbitrarily usurping to make. The king, when he had an intention to seize the liberties of different corporations in the kingdom, because they were not favourable to his wishes, had a plan of getting the governing parts of the corporations into his own hands, and the mode of doing it was to obtain surrenders where he possibly could, and where he was not able to obtain surrenders, then to file informations in the name of the attorney-general. He thought it would not do without some local government in the places, and therefore he meant to institute, as a temporary expedient, a local government of persons favourable to his wishes and his views, but he never meant that those should be perpetually rivetted upon the corporations; he meant, if things should take a more favourable turn, to restore them to their antient rights and liberties, and for that purpose this clause is inserted, that the king might have a power, when times were better, and when tumults subsided, which were then growing fast, by this reservation to put an end to the mushroom charters he was then making, and to restore the corporations to their former state. I apprehend, that if we are to give it a contrary construction, we are acting directly contrary to the rules which have ever been laid down with respect to the construction of the king's grants; for it is laid down in 5 *Rep.* 56; in Knight's case, the grants of the king are favourably interpreted, so as no prejudice shall arise to the king by construction or implication of his grant, any more than he truly intended by it.

This, certainly, was the construction put upon it in the subsequent reign; because your lordships find, that previous to granting the restoring charters, James II. by the advice of his privy-council, in pursuance of the powers reserved in the late patents and charters, removes all the mayors, sheriffs, and other officers; and thus this reserved power was made use of for a beneficial purpose, namely, for restoring the antient liberties of the corporations, which had been arbitrarily usurped and taken from them in the late reign; and I would give *them* credit for understanding the true sense of the charter; they were better acquainted with the policy of the times than we are at this day.

I hardly think, at this day, your lordships would wish to adopt a contrary construction, and to say, that James the II. and his council, when they restored the rights of the antient corporations, did not know what they were about, that they did not understand the clause in the charter granted but four years before. I hardly think your lordships would adopt that kind of construction, which would unhinge all the restoring charters; and it is fair, when we are talking upon the sense of instruments, to argue from what people have done upon them about the time when those instruments were made; we must suppose they understood them full as well as we do; they understood them, as being mere temporary expedients, and therefore they exercised the power reserved under them, and removed all the newly created officers. King James's privy-council, I suppose, was not composed of ignorant men, they were men of abilities no doubt, well acquainted with the times, and well acquainted with the language they used in the different charters.

Now let us consider a little the words of this charter:—the reservation is, that the king shall have it in his power to remove the mayor, the recorder, the common-clerk, or any one or more of the aldermen. Now what limitation is there to the word *more*? how many does it mean? It is said to mean something short of all; why, had he any power to remove *all but one* alderman? I think, according to any sense that can be put upon it, if he had not a power to remove all, he had at least a power to remove all except one. If he removed all but one alderman, and all but one common-council-man, the power of electing aldermen at that time must cease of course, because the aldermen are to be elected out of the common-council, by the majority of the aldermen, and the majority of the common-council; in that case, they could not continue themselves; and it would be just the same as

where a corporation is dissolved by the death of all the natural members. If all the persons who compose the corporation die, there is an end of the corporation; so here, where they are all removed except one alderman, and one common-council-man, there can be no farther election: now if the power of election ceased, how is it possible that the election of Mr. Amery can stand good? It was not necessary that there should be any actual process to remove them, *that* was expressly provided for. If there be a judgment of ouster against a man, there must be a writ perhaps to carry that judgment into execution; but this not being by judicial proceeding, but in consequence of that reservation, the instant the order of council is made, and signified to the persons removed, there is an end of their corporate character; for the reservation is, that they shall "In deed and in fact, and without any farther process, actually, and to all intents and purposes whatever, be removed from their offices;" so there was nothing further requisite to complete the removal of these officers, than the order in council made, and the signification of it to them, which has been found upon this record.

If I am right in that construction, that would make an end to Mr. Amery's title upon this record. If all the aldermen were removed, the mayor and the freemen could not elect. It seemed to me, from an observation made by one of your lordships, as if you thought the mayor and freemen might elect, although the aldermen were removed—that is not the power—for the election under this charter is, that if it should happen that any of the aldermen died, or should be removed from that office, then the mayor, aldermen, and common-council, or the greater part of them, shall assemble together in the common-hall, and shall elect one or more of the common-council of the city aforesaid, &c.—The mayor and freemen have not the right of election vested in them by virtue of this charter, but it is vested in the *mayor, aldermen, and common-council*.

Another ground which has been started, is, that this is a reservation which is void in itself, that the rest of the grant is to remain, and that this is to be considered as a void clause in it. I must own I have not been able to meet with any case upon the subject, and it does not strike me as if it was void upon any principles of the constitution.

I have not found it any where laid down, that the king could not grant a corporation to exist during his pleasure. Supposing the king had granted a corporation, and had given it existence only during his pleasure, I do not know that it would have been a bad grant, at least, I am sure, if your lordships consider it as a void grant, it would equally answer my purpose.

Your lordships will scarcely give it a construction or operation, as if the charter was to exist in perpetuity, and the reservation to be void. Supposing the king has reserved to himself this power of removing at his pleasure; it does not appear to me as if that power was void—the king having placed the local government of the city in the hands of particular persons. What is there contrary to law in his reserving to himself the power of removing those particular persons? Let us argue, by analogy, to other cases:—the king has a right by his prerogative, to remove at his pleasure, the highest judicial officer in the country, to the lord high chancellor; he might, till the revolution, remove the judges at his pleasure; and he may now remove the justices of peace at his pleasure. What is there then so sacred in the character of an alderman, that he cannot be removed at the pleasure of the crown? Why might he not reserve to himself a power of displacing those persons he was vesting with the government of the place? I believe there is no authority in law to be found which says he has not that power; but I apprehend, that if that clause was void, the whole of the charter would be void also, because the king would certainly be deceived in his grant; and I believe no principle is more clear, than that where the king is deceived in his grant, the whole of that grant is absolutely void.

It is laid down as a general position, 2 *Roll. abr.* 164, 2 *inst.* 533, and 1st *rep.* 43 b. 5 *rep.* 55 b. and though where to a grant by one subject to another, a condition is annexed, which is either impossible or illegal, the *condition* only is void; yet,

yet, in case of such a grant by the king, the whole grant is void, 2 *And.* 156, and 2 *Freem.* 17.

If that be the case, that would likewise make an end of the title of Mr. Amery, because, by the inserting of this illegal condition, or illegal reservation (if it is an illegal reservation) the whole of the grant is void: it is impossible to sever the grant, and to say one part shall operate and another not; that would be directly contrary to the intention of all the parties, both of the grantor and grantees.

I will now proceed to trouble your lordships with a very few observations upon the other replication; and the question will be, whether the acceptance of the charter of Charles II. was a valid acceptance, there being another legal existing corporation; and I will suppose, that it might be suspended by the judgment *quousque*.

It has been very properly argued by the two learned gentlemen who have gone before me, that as it does not appear that the judgment has been carried into execution by any actual seizure, it does not follow that their functions were even suspended; but I will consider it as if their functions were suspended, for the sake of argument; and even in that case, I submit, that the charter of 37th Charles II. is absolutely void, or at least it became so when the restoring charter of James II. was granted.

Now it seems, I think, to be pretty clear, that the king, after he had once granted the local government of the place to a corporation, could not afterwards, whilst that corporation subsisted, make a new grant. It is too ridiculous a thing almost to be stated, because it would be attended with a manifest absurdity; for if he could make one new grant, he could make twenty; so the local government of the place might be in the hands of twenty mayors, sheriffs, or different officers. It is too absurd to contend, that while there is a legal existing corporation, he could grant the same power to another corporation: the king cannot grant that over again which is vested in another. I think there is no necessity to quote any case upon that subject; the principle is so plain, that it cannot be disputed.

Then will it be contended, that the old corporation was dissolved by the judgment *quousque*? Why the very nature of the judgment shews it cannot, because, if it had the effect of dissolving the corporation, how could the corporation ever appear to replevy their liberty? It would be nonsense to say the corporation was dissolved—and dissolved for what? for the purpose of compelling a non-entity to appear; and therefore, from the very nature of the judgment, it requires no argument to convince the court, that the corporation was not dissolved by the judgment *quousque*, for if they were, they could not come in to replevy their liberties.

Supposing the corporation was not dissolved, but suspended; what power had the crown then during this suspension? had it a power, whilst the old corporation was existing, and whilst there was a possibility of the old corporation coming in and replevying their liberties, to grant a new corporation in perpetuity? could it make a new corporation, and grant to them in fee or in perpetuity all the liberties of the old corporation? At most, all the power that the crown could get by that judgment *quousque*, would be a power *quousque*; the power could not go beyond the judgment, he could only have a power during that suspension, to appoint or substitute another local government. It could only be during that suspension; then, if the king has granted in fee, he has done what by law he could not do; and therefore, in that case, the grant is absolutely void, because the king, having merely a power to substitute a government during the suspension of the old corporation, when he took upon himself to grant that in perpetuity, did a thing that he had no right to do, a thing contrary to law; he was deceived, and therefore that grant was absolutely void. Therefore the king very properly made this reservation: "Knowing that I have no power to appoint another corporation, but only during the suspension of the old one, I will grant it only during my pleasure." There is no way of making that grant good, but by considering it merely as a grant during pleasure; for if it is to be considered as a grant absolutely in fee, when the king had only a power *quousque*, there must then be an end of the charter of the 37 Charles II.

But

But in another point of view, the restoring charter, I apprehend, must necessarily put an end to it, because I consider the restoring charter as equivalent to a judgment of restitution. Supposing, during the suspension under the judgment *quousque*, the king had granted a charter, and afterwards there had been a judgment of restitution of those liberties; would it have been contended then, that the old corporation was not restored to its liberties? would it have been contended, that the king, by having granted that intermediate charter, had prevented the judgment of restitution, and that the judgment of restitution could have no effect? I think not. I apprehend, that immediately upon the judgment of restitution they would have been in of their antient rights, and of course any intermediate charter would have been absolutely done away: the charter of king James is just the same thing, the king having a power by law, to grant until they shall be restored, and having in fact exercised that power, grants a charter, by which he absolutely *restores* the antient body to all their rights; and by way of making it as full as possibly he can, he not only restores, but *re-incorporates* them; and therefore in any sense the charter of Charles II. must be done away. If the acceptance of the charter of Charles destroyed the antient corporation existing before that charter, by what magic is it that the restoring charter of James II. to the same body, does not afterwards destroy the charter of Charles?

One objection is, that the *second* replication does not state what the power was that had been reserved to him. Whether any power was reserved or not under the charter of Charles II. I apprehend it would be totally immaterial with respect to this replication, because I will suppose for a moment, that the charter of Charles had been absolutely granted in perpetuity, and that there had been no power reserved in the crown to amove the officers, but it had been in as full terms as the antecedent charter of Henry VII. then, I say, still this restoring charter of James must necessarily have done away the charter of Charles, because it is granted to the same body; therefore, whether it was granted in virtue of any power that had been antiently reserved, or not, being a grant to the same body, and being accepted by the same body, that charter of Charles must be totally done away, because it is inconsistent with the charter of Charles with respect to the mode of election. Therefore having accepted a charter which restores them to their antient rights, and grants them all their antient rights, it is just the same as if the charter of Henry VII. had been inserted in the charter of James, which being accepted, the charter of Charles must be destroyed.

Therefore I apprehend that would be an answer with respect to the replication, without stating what power James had. Whether a power or not, is immaterial; he has granted a charter, they have accepted it, and therefore that annuls the charter of Charles.

I believe that in this case it will not be very material, whether we are to consider the replications as distinct, or as taking the whole together; because I apprehend that we have no occasion, in support of one replication, to borrow any aid from the others; but if that were necessary, your lordships cannot shut your eyes to *any part* of this record which is found by the jury; for the crown has a right to state upon this record as many matters as it pleases, and if any of those matters separately, or altogether, make a case upon which the court can pronounce a judgment of ouster, I apprehend they are bound to do it. Perhaps it might be different with respect to pleas pleaded by permission of the court, but I apprehend here they must be all taken together.

These two replications are perfectly consistent, and may be taken together; for it is found, that the king reserved this power, and that he amoved the officers by virtue of that power reserved in the charter of Charles; that constitutes the first replication: then it goes on farther to state, that he restored the corporation to their antient rights. It is all one continued, connected transaction; after having destroyed by the exercise of that reservation the corporation created by the charter of Charles, then he restores the old corporation by the charter of James: but I apprehend

apprehend it is not necessary to call in any aid from one replication to support the other. If I am right, in the first place, that the king had a power to make this reservation, (which I apprehend he had) then it is clear that he has exercised it; and that constitutes one distinct replication.

But even supposing he has not exercised it properly, if it is a void reservation, the whole of the grant would be void; that still comes in upon the second replication.

The next replication is upon this ground; even supposing the power of reservation to have been absolutely void, and supposing the charter of Charles to have erected a corporation in perpetuity, yet the grant and acceptance of a new charter subsequent to it, did virtually, did necessarily, destroy the charter of Charles, and therefore, upon either of these grounds, or I trust altogether, your lordships will be of opinion, that the crown is intitled to your judgment.

Mr. *Erskine*. I understand we have got three instances of writs of seizure, they are Langhour, Thacksted, and St. Ives.

Mr. *Justice Grose*. Have you copies of the writs?

Mr. *Snow*. Yes; but not in court.

Mr. *Wood*. The power of amotion in the charter of York, is in the same words as it is in Chester.

Mr. M I L L E S.

I Rise with some pain, after the very elaborate discussion which has been given to this case by the learned serjeant, Mr. *Erskine*, and Mr. *Wood*, and the time the court has employed in hearing the arguments upon it, to state what has occurred to me upon the question; and I feel it my duty, in a question of such importance, to submit to the court such ideas as have suggested themselves, though I cannot flatter myself they will have much weight.

I shall avoid, as much as I can, repeating either the propositions, or the authorities that have occurred to my learned friends. I feel a difficulty upon one ground, which is, to give an answer to the suggestions just now made by a learned judge, from the bench; they are of a nature with which I am not, nor can I be supposed to be, thoroughly conversant, not having been a special pleader. I do not presume to say what weight the answers that occur to me now, to the objections, should have, but they appear to me in substance to be decisive.

The first objection the learned judge stated is, whether the manner in which other persons should be elected into the places of those amoved, sufficiently appears upon the record, so as to support the conclusion we wish to draw; namely, that the power of electing aldermen ceased.

It seems to me, that the plaintiff having stated not only the manner of election, under the original charter of incorporation, but in every case of death and removal (though not stating by what means that removal shall happen) it is sufficient for us to say, "admitting your right of election and existence, as aldermen, there was a power to amove; by which power you were amoved; and being amoved, ceased to have the power to elect."

It was not for us to state what provision there was in the charter that should cure this power of amotion; it was for them in their rejoinder to state that, as their ground of defence, and to have stated, that although such a power did exist, and that under that power, properly signified, they were amoved, yet that it was coupled with something; which something gave them an existence, and gave them a right to re-elect, under which re-election this defendant is entitled to claim. That is (I submit with great deference) an answer to the objection. If so, the questions upon this replication will be,

First, What the construction of the power of amotion is in terms, independent of the intention of the king; for I think we are intitled to argue from the terms used by a charter, and the court is called upon, if there is not any particular or express intention

intention to the contrary, to be collected from the deed itself, to consider those terms as binding upon every body. I conceive the terms in which the power of amotion is given to the king are unlimited, except as the king shall chuse, or in his discretion shall think fit; he may remove *individually*—he may remove *all*. There does not appear any body to direct the exercise of that power, except the king who reserves it; and when your lordships consider what the consequences are if he exercises the power in its full extent, there can be no absurdity in construing it to give the king the power of amoval of all the aldermen and common-council; for the unavoidable legal consequences must be to vest in the king the power of suspending or reviving the capacity and function of the corporation. It does not appear that the king restored any of the aldermen so amoved, or that any power, after this amotion, was given to any body now in existence, by which the defendant could be elected.

I will consider the words of this clause, first, as giving a power of amotion independent of any other part of the charter. The power of amotion is in these words, “that the king shall have full power and authority, at the free will and pleasure of the king, his heirs and successors, the mayor, recorder, common-clerk, or any one or more of the aldermen, common-council-men, sheriffs, coroners, and justices of the peace, of the said city, for the time being, by any order of the said king, his heirs or successors, in privy-council made, and under the seal of the said privy-council, to them respectively signified, to amove; and declare them, or any of them, to be amoved accordingly.” It begins with those offices that are single in their nature, that are exercised by individuals; mayor, recorder, common-clerk; then comes the coupling word to those offices which are exercised by more than one; the aldermen, common-council-men, sheriffs, coroners, and justices of the peace.

Now, in the grammatical construction of that sentence, is it possible to raise any distinction between any one of those persons, aldermen, common-council-men, sheriffs, coroners, and justices of the peace, so as to distinguish the word *more*, and apply it in one case, in one sense, and in the other case, in another sense? It is perfectly immaterial *how many* aldermen there are, if there are *more than one*: it has not been contended that the king has not the power of amoving the two sheriffs. If he has a power, in the grammatical construction, to remove the two sheriffs, and the two coroners, the more or less does not make any difference; in the grammatical construction of this power, he may remove all of them, because he may remove any one or more. When any particular number is specified in extent, that specification will confine the number; as when a person says to “*one or two*,” two is a specified number, by which the person is bound, he cannot remove beyond that number; but the word “*more*,” is of an indefinite extent, and can be limited only by the quantity and extent of the subject to which it is applied. That I conceive to be the fair grammatical construction of these words, where the intention does not appear to the contrary.

After having recited the power of amoving the mayor, recorder, common-clerk, or any one or more, &c. then it is stated, that he may amove and declare them, or any of them, to be amoved accordingly: *them* means, if he chuses, all; *any of them*, means any of that quantity which he has reserved a power to amove. There seems to me to be a complete power given to the king, according to the fair construction of those words, to remove them or any of them.

Some hints seemed to be given, when the learned serjeant spoke, of the *manner* in which this amotion was to be made. He stated, and I think truly, that it appeared to him the same thing, whether amoved by a general or special order; that under one general order the crown had a right to amove. The only word of limitation is *respectively signified*. The word applies only to the *significavit* of the order; and it was to be respectively signified to those persons, that is, notice must be given them that the king has so amoved. *That fact* is found upon this record; that this order, containing the names of all those persons so amoved, was respectively signified to each of them; therefore no objection seems to me to arise from the mode of

of exercising the power reserved by the king. If the words do, in fair grammatical construction, give such a power, it must be contended, on the other side, that it was not king Charles's intention, after he had conducted himself in the manner he did, in this country, and at that period of time, to reserve a power to cut down corporations at his will, or to new model them in what way he pleased. As if history had not satisfied us that king Charles, and his successor, considered this as their principal object, and their best security, being conscious that the government they wished to establish could only be upheld by keeping the corporations within the royal beck, administered by their own instruments, with power, in case of wilful and positive disobedience, to amove the legal corporators instantly from the offices which they held.

Therefore, there is no reason to suppose he did not intend to reserve a power to amove the whole of them, if he pleased: but the gentlemen contend, under this provision, which states, "that in case of amoval they shall be re-elected according to the directions of the charter," that it could not be his intention to amove them all. I do not scruple to admit, that the king might intend to exercise the power, by removing one, two, three, or more, as circumstances might happen; and he might mean to leave the power of substituting others in their place in the hands of those who had the power under the charter: but even in this view of the provision, when he has a power to remove any one *ad libitum*, an election by the corporation is a farce; for upon the moment they had made an election, the king could amove that person so elected. How ridiculous, then, to say, that this is not exercising a complete power over that corporation, and rendering every benefit precarious which the public could derive under its establishment!

If he had an intention of removing individuals, it was necessary he should make some provision for their re-election: that provision he leaves, in such cases, under the direction of the mayor and aldermen; and because he does so, the gentlemen argue, that the king has not a power to amove all, because there would be no persons to exercise the elective power, in case of the amotion of all. I admit, that this provision only extends to the case where *some* of the corporation remained for an election: But the power reserved gives more; it gives to the king that which he chuses to have—the power of removing all: And as to this objection, "What is the consequence if all are removed?" The king knew he could restore them, and he alone, by his prerogative; he knew he could grant a new charter.

Was it necessary for him to state in this charter, that "Whereas if I remove all under this power, there will be no person who can exercise the right of electing, and of course the corporation must be at an end; therefore, I declare, in such case I will do so and so?" No; he was not called upon to do that; he knew he might amove all: and it seems to me no answer at all to say, that because this provision was limited to particular cases, and did not extend to that to which the king intended it should have no application, and to which, in the nature of the case, it could not apply; therefore, that there should not exist a power to produce an event, which could not be influenced by this provision, or within its direction.

There is no relation in the charter between the power of the king to remove, and the provision to restore, except as applicable to those cases, which it fully answers: therefore, in a case to which it has no application or relation, it would be absurd to limit the king's power in his grant by such a provision. Another fact is, that he *has exercised* this power; and surely the exercise is to be considered as a proof and explanation of the king's intention. When the king has within a very few (three or four) years after the grant of this charter actually exercised the power; when he has in fact removed all the persons by the exercise of such power reserved to him in the charter, with the chancellor and other great and learned lawyers about him, who were able to advise him, that the extent to which he carried the exercise of this power was not justifiable by the terms of it: it is not to be conceived that either the king or his advisers thought differently of the terms or extent of the power. And it is a strong argument that the king having reserved a discretionary power,

exercised that power by removing all : If he had intended not to extend the power to this case, how easy would it have been to explain and limit the power, either by a general proviso ; by saying, " So that the above power shall not affect the usual " mode of election ;" or, " so that there be always left a sufficient number of " electors according to the provision herein after made to supply vacancies ;" or, in the case of aldermen and common-council-men, " but not so as to remove *all* " the aldermen and common-council-men at one and the same time ;" or, " so " that there shall be always existing a sufficient number of aldermen and common-council-men to make an election."

If the intention of the king had been so qualified that the power should not be extended to the length we contend for, his majesty's then attorney-general would have been prudent and wise enough (he was learned enough certainly) to have inserted such qualification in the clause. We are now therefore arguing upon a clause before us, and a fact before us compared with that clause ; the words of that clause give the king that power, and the only argument against such construction is, by applying this provision to a case to which it has no reference. The argument goes no further than to raise a doubt by confounding the power with the provision, which are to this purpose, wholly without dependence or relation to each other : or it must proceed upon this objection ; that as the provision extends to filling up vacancies short of all, when he made provision for filling up those vacancies, he did not say in whom the power of restoring was vested in case of a removal of all, or what would be the consequence of such a removal ! I cannot conceive a reason why the king should state such consequences, because it is so obvious and well established, that the power of restoring, in such circumstances, could only be in him as king. Whether the charter of Charles II. exists or not, is not material upon this replication. The conclusion drawn by us upon this replication is this : " That the said " power in the said last mentioned letters patent, as to the election of aldermen, " ceased and determined." For if from the observations that have been made upon this power, the court shall be of opinion that the power could legally be exercised by the king to the extent it appears it has been exercised, it is clear that the power of electing aldermen under that charter ceased, according to the averment in our pleadings ; for the power of electing is as much affected and destroyed by the destruction of the power itself, and by the suspension of it under certain circumstances, as by the incapacitating those persons who alone could exercise the power. Then if all the aldermen and common-council-men were removed, as it is stated in this record, it must follow of course, that the corporation was without integral parts, without activity ; and whether by destruction or suspension of the power or of the persons who were to exercise it, the power of electing aldermen did cease, and was at an end. It was incumbent upon the defendant, if it has been restored or put into any other shape by the king, to have stated that upon the record : no such fact is stated, therefore we are to presume that the power of election was totally annihilated and gone.

Another observation occurs, supposing the construction of this power to be, that he might amove the whole corporation ; whether the charter is void or no ? or what effect it would have upon the charter of Charles II ? But it is the same thing whether that charter of Charles II. is considered as void *ab initio*, or void by a fact which has happened. If it was void *ab initio*, Mr. Amery cannot support his election ; for upon the court deciding that the letters patent were void, no legal or valid election could be had under them. It does appear to me to be established law, and I have not, I confess, been able to find a case to the contrary, that where the king is deceived in his grant, where he grants upon a consideration contrary to law, that grant must be illegal *in toto*, and void. It is clear, in addition to the authorities Mr. Wood mentioned, that if the king attempts to grant a new-fashioned estate, his grant is void ; and this is an answer to a case put by the learned judge, whether if the king had granted to a man and his heirs, and then had contradicted that grant totally, so as to make it null ; or if he alters the tenure in a way the law does not recognize

recognize—as being a new-fashioned estate, the king cannot grant it. The word *estate* is not confined to land, it may and does apply closely to the idea of *corporations*; and, as such, is of the utmost importance in consideration of the king's power over them. Corporations are a primary object in this constitution. The whole executive power of the country is vested in corporations; and where the word *estate* is there used and applied to the king, it does not mean that he cannot vary the law as to *the land* only; but he cannot alter that which the common law has established as the *right of the people*. Therefore I say, and submit with earnestness to the court, that if the king attempts, in cases of corporations, to create a new-fashioned estate, which the law has never heard of; that attempt, being illegal, cannot succeed; but the whole grant is void. There is also another principle and reason for avoiding this charter—that as we are not to go out of this record for the king's motive or object, and it is not to be presumed that the king had any other intent than what is expressed in it; if a condition appears in that record which might operate upon the mind of the king, or induce him to create this corporation, or a consideration for the charter stated in it, which must be taken to have an effect upon his intention; such condition or consideration being illegal and void, the whole grant is void.—Therefore I shall contend, that not only in the extended, but in the limited, construction of this power reserved by the king in this charter, there is an end of the charter: because the king cannot reserve a power in a charter, which the law does not give him; he cannot delegate to the corporation a power of removing any individual without cause: if he cannot delegate it to a corporation, he cannot delegate it to his privy-council; for I conceive this act, by order of privy-council, is not, and cannot be reputed, an act of his prerogative.

It is perfectly clear, since *Magna Charta*, that it is impossible for the king to exercise any power in his own person, by his own letter, or to remove from any franchise in any other way than by the voice of his judges, and by due process of law; by which every subject of this country is secured in his franchise, and in his rights, against any wild and novel power in the crown.

Lord Coke, in his reading upon the statute of Gloucester [2 *Inst.* 282. *Magn. Chart.* c. 29. 25 *E. 3. fl. 5. c. 4.* 28 *E. 3. c. 3.* 42 *E. 3. c. 3.*] says, “Here is an antient maxim in the law implied, that no man ought to answer for his freehold, or franchise, or other thing, without original writ. Therefore, very early it was taken, that the king cannot, without writ, proceed against any franchise. And it appears [9 *E. 1. coram Rege Rot. 17. Suffex*] that William de Pembrugge, attorney-general, for serving a process without writ, was committed to gaol; and to speak in the general, it is clear that the king cannot, by his prerogative, remove or affect the franchise of any man or corporation in this country. The king must exercise his prerogative according to law, as laid down in Norris and Stap's case, in *Hob.* 211. If the king, in his letters patent of incorporation, does make ordinances himself, they also must be subject to the same rule of law. [49 *E. 3. 4. 49.*] The king cannot alter, by his prerogative, the course of descent of lands.” In *Owen*, 90, it is said, that he cannot alter estates in general; and lord Coke, in 2 *Inst.* 282, says, “A descent of franchises puts the king to his writ of *quo warranto*: and note, the king's *quo warranto* is in the nature of the king's writ of right for liberties and franchises.” Then let us see whether any other argument can be adduced, except that he has reserved this by his charter; and perhaps it is to be argued, that the grantees have consented, and that the grantees must therefore be bound by such consent, and must submit. Mr. Wood has supposed the king could grant a corporation at will; perhaps he might, but in the terms of it, it must be a corporation at will. In all the cases where the liberties were seized, there were persons appointed to manage the liberties and franchises of corporations, but expressly during the pleasure and will of the king; as *custodes*, or guardians of the liberties: but the king cannot grant a corporation in perpetual succession, and reserve a power of removing, at his will, individuals of that corporation, who, by the construction of the common law, and the cases that had been applied to that question,

question, [*Jenkins* 270, 1 *Inst.* 250] have franchises, and a legal, existing, permanent title in the corporation. It is the clearest principle in law, that a charter cannot alter the common law; and why? what is the charter? It is only the medium by which the king exercises his prerogative: it is the medium through which he declares his intention, by which he communicates that power to a subject; the charter does not create the right in him; it is only a declaration and communication of the right he had before vested in himself by the common law: therefore, if he has this prerogative at common law, of moving at his pleasure, he cannot reserve that power to himself in any other form, than in the way the law gives it him.

In *Bro. tit. patent* 100 [6. H. 7. 4.] the king cannot make a felony by statute, inquirable at the leet, by his grant, nor grant a leet to be of other nature than at common law. The king cannot alter the law by his grant, and yet he may grant a cognizance of pleas, but not to alter the nature of the pleas, nor the nature of the court: though he can grant corporations; though he can delegate his power to particular people to exercise this government, he cannot delegate it in any other way than the common law enables him to do; he cannot alter the fashion or the nature of the rights of persons vested in them, as corporations.

That there is a right vested appears clearly from the nature of such incorporations as these; they are distinguished by sir Robert Sawyer, in his argument, and in a variety of cases, as created either for general or for special purposes. This is one for general purpose; for government of the city; for the administration of justice in it; and it does give the fullest power that the king, by a charter, can give to a corporation. From the mere creation of this it appears, that rights are not only vested in the corporations as incident to it; but the rights are vested immediately in individuals, as interested in it; and they are franchises vested in them originally upon incorporation—franchises in the abstract; franchises which they have a right to preserve in the form given to them, and with which the king cannot interfere but by a process in his courts.

In *Jenk.* 270, it is said, a succession attaches upon the very being of a corporation, when the charter of the king has declared a corporation to exist for a general purpose, as the common law attaches this and other material franchise incident upon it.

In *Bagg's* case, lord Coke said [11 Co. 95 b.] a corporation is such a right, that every member separately considered, hath a freehold therein; and all, jointly considered, have an inheritance, which they hold in succession: here every individual is concerned; then the question would be, whether the king can make a corporation, and by his prerogative deprive that person who is seized or invested by law, with that freehold?

In *Cro. James* 540 [Warren's case] it is admitted, that aldermen and freemen have a freehold in their franchises. Even in the argument of sir Robert Sawyer [*quo warranto*, p. 55.] when he speaks of the bad consequences, if the city of London are not answerable for their misconduct, he says, "The city will no longer hold all their liberties from the crown, *quam diu se bene gesserint*, which was the antient tenure reserved by the crown, and *the law of the land*, upon their first erection; but they will gain *absolutum dominium*."

Amongst these liberties, the franchise incident to a man, as a part of the corporation, is one. Sir Robert Sawyer says, *quam diu se bene gesserint*, is the tenure prescribed by the common law; then can the king, by his prerogative, alter that estate without cause, and without reason for doing it? Can there be a doubt, upon these authorities, but that these franchises are considered in the law as vested rights? and whether the consent of the grantees to such a power as this can bind or no, will appear best upon considering what the extent of this power reserved is, and what its effect upon the existence of the corporation. It is not confined to those persons to whom the charter was directed, but that every person who shall be elected hereafter, shall be amoveable at any time, at the will and pleasure of the king, without any cause, but merely because he chuses to do so. That is a power which no man can give to the king, to possess and exercise over the franchise of another. It is a conspiracy

conspiracy against the oath of a freeman, who is bound by that oath to preserve the privileges and liberties of the corporation, which are lodged in him. No corporation can continue its existence, if the freemen sacrifice the trust lodged in them for public purposes; therefore your lordships will not argue from that which is a matter of complaint and crime in the freemen, as if it was a ground for supporting and giving efficacy to the grant of a king, and to a power, which, by law, he was not able to reserve, nor the corporation, by consent, to transfer to him. There can be no doubt in most cases of grants, but that grantees would rather take some benefit than none, and that is another reason why it has been held more prudent to consider the grant as void *in toto*, and not binding as to the legal provision and bad as to the rest; and not to permit a grantee to take it otherwise than as the law gives it. [*Earl of Kent's case*:—if the king being guardian, grants the land in fee, the grant is void, *Hob.* 155.] A contrary principle and rule would induce and encourage attempts to vary and defeat the law; if, upon the failure of such attempts, the grantee was still to have a portion or some benefit from such a grant. It is impossible, consistent with the true principles of our law, that the king, or any other persons, should alter the law of the land by consent, or affect the nature of estates, or the tenure, which the common law is directed to preserve.

In *Bagg's case*, it is held clearly, that a corporator cannot be removed from a franchise without reasonable cause; and the reason given is, that it would be a wrong to an individual to remove him from that franchise—which the corporation shall not do. They cannot prescribe to do it: there cannot be a custom in a corporation to remove without a reasonable cause; then shall the king do wrong to the subject? Shall he be permitted to do that, when it is expressly a principle of the constitution that he can do no wrong? [*Plowden* 233, *Eadem præsumitur mens regis, quæ est juris—Et quæ esse debet.*] The king's grant shall not work a discontinuance, because it would be doing a wrong, if it is a wrong to a subject, to remove him without cause. [*Hob.* 154, 155.] The removal, without cause, is the wrong; and it is as much a wrong to the subject, if removed by the king, as if removed by the corporation without cause; therefore, as far as that argument goes, it is clear that the king can no more remove without cause, than a subject, because he cannot do wrong; and it is as much a wrong if done by the king, as a subject. The creation of corporations is a matter of high trust and prerogative; [*Jenkins* 270—1 *Salk.* 193]—and the king cannot transfer that power to another, unless he transfer with it all the *jura regalia*, which, in the case of a county palatine, he does; and then the creating a corporation is one of the incidents to the *jura regalia*.

The king, though he may grant for the promotion and assistance of trade [2 *inst.* 47. *City of London's case*. 8 *Co.* 125.] cannot make a grant to the prejudice or diminution of it: he cannot delegate to a corporation a power to defeat the object of its creation, but he may to preserve it; and the law must decide whether such grants or powers do operate to the change of estates, the disinherison of franchises, and to the destruction of the principal end and object in the creation of corporations for public government. It is said, a corporation cannot prescribe to remove without reasonable cause; and if they cannot do that by prescription, it should seem they could not do it by act of parliament; for prescription may be either by charter or act of parliament. It seems also clear, that if the king cannot delegate it to a corporation, he never possessed that power himself; for he may, by his charter, modify and direct how elections shall be made, by what part of the corporation, and under what forms; but he cannot impower the corporation, or any part of it, to deprive a corporator of a franchise without a cause, because the law does not allow him to possess such power; and he cannot delegate what he does not possess. Then, what reason can there be for his pretending to delegate it to the privy-council? They have no relation to the corporation—they cannot be fit judges who shall, or shall not, remain of that corporation. The privy-council is not the place in which the king can exercise his acts of prerogative; he cannot de-
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pute this power to the privy-council; but if it is an act of prerogative, and solely of prerogative, he should exercise it by the great seal, in the way in which he grants his charters, and exercises other acts of prerogative. From very remote times, the interference of the privy-council has been offensive to the country, and restrained by several positive statutes:—[In 2 *Roll. ab.* p. 212. pl. 5, and 6, *Rot. parl.* 25 *E.* 1st *pt.* n. 16.]—The commons pray that no man shall be put to answer of his freehold, nor of any thing that touches life or limb, fines and redemption, by being summoned before the council of the king, nor before any of his ministers whatsoever, except by process of law of antient use. The king answers, "It pleases him that the law shall be observed, and that no one shall be held to answer for his freehold, except by process of law." Again, in [*Rot. parl.* 42. *E.* 3. n. 12.] "Whereas divers are accused before the king's council, &c. the commons pray that no man be put to answer without presentment before the justices, or matter of record, or upon due process and writ original, according to the antient law of the land; and if any thing is done to the contrary, that it shall be void in law, and held for error. Answer—Because this article is an article of the great charter, the king wills it." A repetition of these complaints probably produced the *St.* 11. *R.* 2. c. 10. "It is ordained and established, that neither the letters of the signet, nor of the king's privy-seal, shall be from henceforth sent, in damage or prejudice of the realm, nor in disturbance of the law. And what can be more in disturbance of the law, than to exercise this extraordinary power, not grantable to the governing part of a corporation, not capable of being claimed by prescription; by which all the quo warrantos, which were the king's writ of right for the franchises, and were for the protection also of the subject; and all process, upon which the king can proceed for forfeiture and seizure, are rendered nugatory, and wholly useless; and this in cases of impeachment and destruction of the most valuable franchise and freehold! Is it too much to contend, that such a power cannot be delegated or exercised by the king in council?—Whether the king can, by the authority of council, revoke a grant under the great seal, might also be a serious question, I shall submit to your lordships—he cannot delegate that power to a corporation—that he cannot delegate it to the privy-council, or exercise it by an order there made—that the power is illegal and unconstitutional—that the mode in which he has exercised it, is a mode, in which by law, he cannot exercise it—that the consequences would be monstrous if he could do it. It would be new fashioning the estates of corporations, which was indeed the object of that monarch; but fortunately for this country, not suffered to prevail. It has been declared illegal and arbitrary; and therefore, I trust your lordships will not allow a grant to be established in the court of king's-bench, which contained a clause so hostile to the constitution.

For these reasons, I submit that this clause, if it even were construed, to extend only to the removal of individuals possessed of franchises in the corporation, and should not operate immediately to the annihilating the corporation itself, being void, the whole grant must fall to the ground for the reasons above given; and because it was clearly the intention of the king, to create that corporation, reserving to himself this power, which, as being void in law, he cannot exercise; and being so far deceived in the consideration of this grant, the whole grant falls to the ground. [Grant of an office, with a new fee, payable by the subject, is void in toto—2 *inst.* 533. 1 *rep.* 43. 5 *rep.* 55. 2 *Anderfon*, 156.—*Needles, v. Bp. of Winton.*] In *Hobart*, 223, it is expressly adjudged by the court, that if it appears in the body of a patent, that the king errs in his judgment to his prejudice, that will make the grant void.

And the case of lord Mulgrave, *v.* sir John Monson, 2 *Fraem.* 17. which was quoted by Mr. Wood, is applicable, and in point to this question. It was the lease of a manor and mines, and the lessee had a power granted to him of the sole vending of allum, reserving out of the premises 10,000*l.* a year to himself, and 1640*l.* to lord Mulgrave. The question before the chancellor was, whether this grant, being

being void in part, for vending allum, is void in the whole? It was held, that if it was in the case of a subject, it might be a good grant; but here the king was deceived, for he intended to grant the sole vending of allum, which he could not do, and the court held the whole grant was void. Upon these grounds then, upon the first replication, I submit to your lordships, 1. That the power of amotion was extensive enough to justify the king in the removal of all the aldermen and common-council; that by the removal of all, the power to elect aldermen ceased; and that Mr. Amery cannot support his election under that charter. 2. That if it is an illegal power, either on account of the effect it has ultimately upon the corporation, or from the attempt to remove an individual from a franchise vested in him, by law, or as creating a new-fashioned estate in a corporation; therefore the whole grant must be void; and then it is impossible for Mr. Amery to support his election.

Mr. Bower, in opening his objection to the second replication, said, that at the time of granting the charter of Charles II. there was a judgment suspending the functions of the corporation; that during that time the crown might either make a new grant, or make letters patent of restitution, on which the court would award a writ of restitution.

Now the first object will be to settle, whether the grant of Charles II. was made to the *same* corporation that existed under the charter of Henry VII. or to another corporation. The learned serjeant has supported, with very strong arguments, the former of these propositions, that it was granted to the same body. That the court should conclude from this record, that the charter of Charles II. was granted to the same corporation which existed under the charter of Henry VII. That the charter of James II. was, of course, granted to the same corporation; and therefore by the acceptance of these successive, inconsistent charters, the charter of James II. must be the ruling charter of the place, and the charter of Charles II. must give way; for the same reason that Mr. Bower, upon an assumption that they were different bodies, argued, that the charter of James II. could not be accepted because it was repugnant to the charter of Charles II. under which a complete corporation existed. I am sorry to differ from my friend Mr. Erskine, who seemed, in his argument, to suppose that they were not the same corporation. I confess I conceive, from reasons and authority, that the body accepting the charter of Charles II. should be considered to be the same body which existed as a corporation, under the charter of Henry VII. and Elizabeth. It is clear that at the time of issuing the quo warranto, there was a perfect and complete corporation existing at Chester, which governed the city, and were invested with every power necessary for such a corporation; which had been continually exercised long antecedent to the writ of quo warranto being issued out against them by Charles II. Therefore, if Mr. Bower means, that the king had a right, upon a judgment *quousque*, to grant a new charter to the *old* corporation; and that the *old* corporation accepted it I shall not dispute with him the king's power in that particular, and that the corporation, whatever might be the effect of the judgment *quousque*, even in the wildest way of viewing such a judgment, had a capacity of accepting such a charter. If they did accept that charter, the consequence must unavoidably be, that wherever the charter of Charles II. was inconsistent with the charter of Henry VII. and the charter of Elizabeth, the charter of Charles II. must obtain and govern. They could not take the election of one officer from the charter of Charles II. [*Pollexfen, arg. p. 105, 113. 1 inst. 102. per Holt, C. J. 2 lord Ray. 1239.*] and another from the charter of Henry VII. if they were inconsistent; but in all consistent points where the king does not appear to mean to derogate from the existing charter of the place, the new charter will not affect the ancient usage [*Luttrell's case, 4 Co. 86. Haddock's case, Ray. 439. Burr. 1870.*] There is no change of name, or of the integral parts of this corporation, which could induce the court to believe that it meant to vary the essential consistent parts of the corporation. Then all the rights, under the charter of Henry VII. and Elizabeth, which were continued under the charter of Charles II. were secured and valid under that charter. Wherever it was inconsistent with
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the charter of Henry VII. and Elizabeth, such alteration was adopted, and must have continued in force till the charter of James II. Whether that charter be considered as a restoring, or as a new grant, it was granted to the same body; it was granted by the same name to the same integral parts; therefore the charter of James II. could not affect any of the integral parts, but it would affect the right of election, stated upon the plea of the defendant, under the charter of Charles II. because the charter of James prescribes a different mode of election from the charter of Charles; and as it was accepted by the corporation, the corporation was bound by it, and Mr. Amery, who claims to be elected under the provision of the charter of Charles, which as to this was repealed by the charter of James, is not rightly elected.

There is a case in *Skinner*, 574, and another in *Andrews*, 295, which seem to me material to shew the effect of successive charters, granted to the same body and corporation, and accepted by them. The first was an information against Larwood, for refusing to serve the office of sheriff; an election shewn by the mayor and aldermen: the information stated, that the city of Norwich is an antient city, and that Henry IV. by his charter granted, that the mayor, aldermen, and citizens, might elect two to be sheriffs of the said city; but that after this, Charles II. in the 18th year of his reign, by his charter granted, that the mayor and aldermen might elect one sheriff, and the citizens might elect another; it then says, that the defendant was elected to be sheriff of the said city, and that he refused to be sworn, or take this office upon him. It was objected by Eyre Justice, that the election was not good, because by the charter of Henry IV. the election is vested in the citizens, and the defendant was elected by the mayor and aldermen; and though this was according to the charter of Charles II. yet this charter cannot divest a right which is vested and settled in the corporation, and in all the citizens, by the charter of Henry IV. The right of election rests in the citizens, according to the charter of Henry IV. and therefore the election is void. Holt, C. J. and G. Eyre, *contra*: A corporation may accept a new charter; and the election under it according to the mode prescribed, shews their consent and acceptance of it—election good. The case in *Andrews*, 295, was, a quo warranto against the defendant, for usurping the office of a jurat of the corporation of Maidstone: the defendant set out his election according to a charter of 2. James I. which directs, that the mayor and jurats shall chuse jurats out of the freemen: to which the coroner replies, and sets out the charter of 17. James I. whereby the mayor, jurats, and commonalty, are to chuse jurats out of inhabitants. Argued, that both were consistent, but *non allocatur*, and judgment given for the crown. These two are precise authorities, that where there are successive charters, leaving the essential privileges and rights of the corporation the same, but varying the mode and form of election in some particulars, the last charter is to prevail. Therefore, supposing this to be the same body, the mode of election will be that prescribed by the charter of James II. which appears different in this record from that prescribed by the charter of Charles II. and the defendant cannot be elected under the charter of Charles II. because the charter of James II. as to this, repealed that charter.

It appears, that the charter of Charles II. is granted with the exception of particular persons: if it was not to the same body, why should those persons be excepted? Probably, those persons would have been considered as members of that corporation, unless they had been so excepted. To consider the bodies as different, would produce this gross absurdity—that the king should grant to two bodies in the same place, the same privilege and jurisdictions: it is true, that this conclusion will depend upon the question, what effect the judgment in quo warranto had? Upon the first appearance of things, from the general nature of a judgment *quousque*, it would appear odd, that the king, without completing a final judgment, and without proceeding effectually against the old corporation, should affect to grant to a new body, to exist in the city of Chester, with all the privileges, and as extensive as those enjoyed by the old body, and hostile to them; and at the same time with equal power: so that they must be quarrelling and fighting with each other, and undecided which should

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be entitled to the preference in such disputes. It seems to me, notwithstanding the judgment *quousque*, that the old corporation was existing: such a construction in some degree explains the reason why the king did not proceed to final judgment; for if the old corporation accepted this charter, there was no reason for proceeding to final judgment against them: finding the old corporation come to his terms, he was satisfied, and did not proceed: it is clear, from the instances produced, that in other cases he did proceed to final judgment. If this charter was granted to a new body, all the prescriptions, all the tolls, the lands, &c. were gone; for the old corporation must be supposed to be at an end, and therefore the new corporation could not take, either by prescription, or have transferred to it, any of the privileges or the rights which belong to the old corporation [Pollexfen, arg. *quo warranto*, 105. 113. 1 *Inst.* 102. 2 *lord Ray.* 1239.] Here, your lordships not being precluded, by the state of the record, from saying, that it is the same corporation, I submit it appears to be the same corporation, that the court should adjudge it to be the same, for the preservation of the prescriptions and enjoyments they had under the old charter. That there are other reasons which I dare say will strike your lordships why it would be better to decide the acceptance of this charter to have been by the old corporation—

Mr. Justice *Grose*. Could the crown grant a new charter to the same body, with the same powers, and except seven persons?

Mr. *Milles*. No; the learned serjeant stated, that if it was granted to the same body, it was void, that if the acceptance operated to defeat and disfranchise any of those persons who had the right, the charter would be void, because the court would never consider it to be a legal acceptance; then if the charter is void, by whatever means it is void, our end is answered. Mr. Amery cannot support his election under a void charter.

The next question is, what effect the judgment *quousque* had upon the old corporation? This has been very elaborately argued by Mr. Erskine and the gentlemen who preceded me. Mr. Erskine has stated very truly, and the court must feel, that where there is an existing right in a corporation, it is not enough to say that right has been called in question, and therefore you must come and prove a writ of restitution. No; unless it appears upon this record that your lordships are bound by the operation and effect of this judgment to say, "The king had a complete power after such judgment, to dissolve and annihilate this corporation, and to consider it as gone and extinct;" we stand upon the old existing right, the vested franchises, which do not appear to have been affected by any thing but that judgment *quousque*; and I submit to your lordships, the king cannot interfere with, or extend, the true, known, and established effect of such a judgment. The court only can explain its own judgment, and the court should not, and will not, be inclined to extend that judgment, for the purpose of destroying an existing corporation, for the purpose of answering an illegal end.

A *quo warranto* has been considered as a writ of right by the king. [Pollexfen, *quo warranto*, 114. 9 *Rep.* 28. 2 *Inst.* 282, 495.] I think the analogy of the process of a writ of right will explain the judgment *quousque* in some things; it will shew that a judgment *quousque* has been considered as nothing but process to enforce appearance, and that it has no effect upon the rights of the person against whom the suit is instituted. Sir George Treby [In his argument, *quo warranto*, p. 13. See also Jenkins, p. 141. *case* 91.] says, "There is some resemblance between a seizure upon a grand cape and that of the king's suit upon default, and the resemblance is, that appearance for both is upon mesne process. If it is a real action, there goes out a grand cape, and there the lands shall be seized into the king's hands, and that looks big upon record; but if you come to know the meaning of it, it is only that the sheriff should return issues upon it, and that is a very little thing." The king has no pretence to the title of the land, nor is the suit *his* suit, but that of the parties. The observation of sir George Treby there seems extremely material, if there is that resemblance between a grand cape and a judgment

quousque; it is the king's, but it is also legal process in which he cannot interfere; he cannot stop it, it must follow the course of the courts, it is only until appearance, that the sheriff may raise issues upon it, and that is a very little thing. All these cases of seizure are to enforce appearances: they are to be considered merely as vested in the hands of every court to enforce its authority, but certainly not intended to decide the right; for it is not known upon the writ of summons to appear, but the parties summoned may be very well able to answer to the information; and therefore it is going too far to presume, that on account of non-appearance, which may be from a variety of reasons, occasioned by mere accident or ignorance, the court should extend such process beyond what is the real object of it, viz. to enforce appearance in the nature of issues.

It is clear also from *Booth's real actions*, p. 7. that when the tenant makes default, and the entry in consequence of that default is made, a grand cape issues; for what? for him to come in and answer that plaint, that is, the cause of the action; it does not appear before the parties come in, that there has been any answer given to that action, upon which the court can decide the merits of such action. And *Jenkins*, p. 141. puts this case; a writ of right for land is brought against A. he does not appear, a grand cape issues, he makes a default; judgment final shall not be given until appearance and trial by battle, or by the grand assize; after the issue joined on the mere right, or after the mise joined and a departure in despite of the court, or after the mise joined and a default and a *petit cape* awarded, and upon this a default not saved: In these several cases, judgment final shall be given. It is observable, that in every one of them the mise is joined before judgment final upon the right can be given.

Now as far as the analogy of a writ of right goes, the grand cape does not affect the right of the land in any way, so that the land can be considered as forfeited to the demandant, or that the object of his suit is in any way decided: the process in quo warranto is like this; as in the cases of Malmesbury, St. Ives, &c. Your lordships will find, that upon this *quousque* judgment, nothing appeared to be decided. If there was a writ of seizure upon default, it was not enough, but the attorney-general was to move the court before final judgment could be entered up.

Then if these were the proceedings against the several other towns whose franchises were called in question, and no proceeding of this sort appears against Chester, a different conclusion, and in favour of the liberties of Chester, must be drawn by the court. The process stops short after the non-appearance, there has been time enough for the king to take advantage of that non-appearance. It is for the king who prosecutes his suit to enter upon the records of the court in which he proceeds, such process and proceedings, that the court shall say he has carried on his suit with effect. If the king meant to produce that effect from a quo warranto (which is of the nature of a writ of right) if the king meant to work a forfeiture, it must be by the regular proceedings of the court upon that writ. The proceedings appear to be regular and complete in Malmesbury and the other cases, and it is stated in the quo warranto case, notwithstanding the judgment of forfeiture, notwithstanding the judgment of seizure in consequence into the king's hands; yet not an instance can be shewn in which a corporation has actually been annihilated. And what is more remarkable, as applicable to the present case, I defy my friends on the other side to shew a case in which a new corporation has been granted upon such forfeiture and surrender, and the prescriptions of the old one have been lost and gone.

If the king has never presumed to create a new corporation [*Case of Langbourn, St. Ives, Calne, Malmesbury.*] upon the idea of the annihilation of the old one, even where the court, looking upon its own records, finds final judgment entered up, and the proceedings in the quo warranto carried on to a regular judgment of forfeiture; how much stronger is this case, where there are no proceedings farther than a judgment for default of appearance! It is certainly material that the court should look to its own records, and that the parties should be bound by what appears upon those records. It is not right that the city of Chester should be pre-

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vented from the possible advantage of an error in the proceedings; if there had been any defect in any of them subsequent to the *quousque* judgment, we might have taken advantage of that defect and reversed the whole for error. As in the case of New-Radnor [*Sir R. Sawyer's arg. quo warranto*, p. 31.] there was a judgment by default, the king proceeded to final judgment, and there, because the judgment was entered in *miser cordia*, instead of *capiatur pro fine*, the judgment was reversed, and New-Radnor was restored to all its privileges. I will now consider what is the effect of this judgment *quousque* upon the franchises, liberties, and existence of the corporation?

So early as the 2d. Ed. III. 28 and 29, pl. 23, *Scrope* lays down this rule; he says, in some cases a franchise ought to be taken into the king's hands. Now it appears to me, that that is exactly the case, where the court puts it into the hands of the king by the form of its proceedings. Secondly, in some cases it ought to be seized, until a fine be made to the king. The third is, that in some cases it ought to be fore-judged.

These are the three distinctions taken upon the word seizure, so early as the time of Edward III.

It is in the first place seized into the king's hands. In the second instance it is seized till fine is made; where, as in the case of Malmesbury, they proceed beyond the judgment *quousque*, there the king has the power of proceeding by fine; the court, as it is laid down by *Sawyer* in the *quo warranto* case, cannot admit to a fine, after a final judgment; it is in the breast of the king, but before that, it is entirely in the breast of the court. The parties come to replevy their liberties; [*St. 18. E. 1. 30. E. 1.*] where do they come? not to the king, but to the court; they come to appear here in the court where the king cannot personally appear: the king cannot take notice in what state this suit is, till something is done which vests the franchises and liberties in him, till he has a power of exercising a discretion upon those liberties, and either permitting the parties to return to the enjoyment of them upon a fine paid, or of entering up complete judgment upon the record.

But when they are put into the king's hands, it is by the court, which has still complete power over them. And your lordships will find in the case of York, that upon their appearance, long after issuing out the *quo warranto*, the court admitted them, and the appearance being satisfied, they were permitted to go on and plead, and then the question arose, whether they had or not forfeited their franchises: they were permitted to do away all the effect of the judgment merely by appearance.

There is also a distinction which may deserve attention, in the entry of a *quousque* judgment and a judgment after seizure for forfeiture, which confirms the ideas and rules above stated. The judgment *quousque* for non-appearance is the proceeding of the court, and the entry is, "Until the court shall further order;" but in the judgment of seizure, for the forfeiture, or forfeiture found by inquisition, the king alone is to act, and the king alone can admit to a fine, and the entry of such is frequently, "*Quousque dominus rex aliud perceperit.*" As far then as the *quo warranto* bears any analogy to the proceedings in a writ of right, as far as it bears analogy to a common suit, if the plaintiff does not proceed in it, the defendant has a right to say that the plaintiff has waved his suit.

The case *Mr. Erskine* has quoted from *Jenkins*, 141, appears as an authority to deserve all the weight he claimed for it in his argument. The case is thus stated in the report: a *quo warranto* is brought in the king's-bench, the defendant being summoned, makes default, and another default at the return of the *venire facias*, judgment shall be, that the franchise shall be seized into the king's hands, and not that it shall be forfeited: for it does not yet appear, whether there will be cause of forfeiture; no man shall lose his land or his franchise upon any default, if he has never appeared: and this by the judges of both benches. The reporter then states the case of a writ of right [*vide ante*] and under what circumstances a judgment final can be entered up in that writ. If this is law, it is demonstrably certain, and

an inevitable consequence, that the judgment upon non-appearance not working a forfeiture, the king can have no power to grant a new charter, or found a new corporation, upon the entry of this judgment only, against the old corporation.

It is said by Mr. Justice Yates, 3 *Burr.* 1532, that there is no jurisdiction in this kingdom where a defendant can be convicted unheard. He was speaking of a trifling thing compared with the existence of the corporation of the city of Chester. We are speaking of a corporation in existence, in the full exercise of its right, summoned to appear at a time, and in a manner, which one would have wished had never occurred in any period of our history, nor to any corporation in this country; and upon this default of appearance, it is contended, that a forfeiture of their existence as a corporation was incurred.

Sir Robert Sawyer says [*quo warranto*, p. 17.] there was an antient rule, that judgment of seizure and not of ouster, should be given in all cases of default or non-appearance; and this was for the preservation of franchises and relief to the subject, and that he might not suffer by laches, mispleading, or default in his liberties, but may have an opportunity to come in and cure that default, and save his franchise. That this rule was made so early as the reign of Edward IV. The principle is universal in common law, that no man can be convicted unheard; persevering and obstinately refusing to appear, is construed into an admission of guilt, or of want of right to hold the property or franchise demanded; but the final judgment is the regular and best proof of this obstinacy, and the legal mode of punishing it. If a final judgment is unnecessary, why cannot the king, immediately upon suing out the writ, and calling upon the persons to answer, create a forfeiture? All further delay would be useless, if a forfeiture could arise in the early stage of the suit. If then this judgment *quousque* does not annihilate the being of the corporation, I contend that the king cannot grant to its prejudice. Sir Robert Sawyer, in page 6 of his argument, says, "My last answer is, that where the king proceeds for a forfeiture upon breach of condition, the right is not determined till judgment of seizure; for it is a mistaken ground, that forfeitures to all purposes relate to the time of the forfeiture; for as to copyhold estates, offices, and liberties, in case of the king, which may be determined by breaches of fact, they are not avoided till the fact which causes the forfeiture be found upon record." Then taking it as Mr. Attorney-general states it, and as the truth is, there are only three cases in which a forfeiture can be worked; "Upon office found, inquisition, and a judgment finding the fact of forfeiture upon the record." Is there any office found here? Is there any inquisition? Is there a fact of forfeiture suggested? My friend, Mr. Erskine, has argued very ably here too; he has called upon the gentlemen to state where the fact of forfeiture is even stated in the charge: there is no fact stated upon which the forfeiture is to be produced, except that they usurped to be the corporation of the city of Chester; but till that fact is found, that they do it illegally, it is not the non-appearance to this suit which can supply that defect.

It is remarkable too, that in the case of Malmesbury, when they came to final judgment, it is said, that the liberties were vested in the king absolutely. That is a material observation; because till the final judgment comes, it appears they cannot be considered as vested in the king absolutely: the reason given by Sir Robert Sawyer is, that the court directs, and not the king; till final judgment is entered up, it is in the hands of the court; when final judgment comes, then the liberties are said to be vested absolutely in the king. I submit to your lordships, that till they are vested absolutely in the king, it is impossible that the king can dispose of them, to the prejudice of those in whom the law has vested them, and in whom they continued vested till that final judgment.

I did state, and it seems to be a strong argument, that taking the full extent of the forfeiture which can be procured by a final judgment, it is a striking circumstance, that there never did exist a case (at least none was found by the attorney and solicitor-general, who argued in the case of the city of London for the crown) in which, by forfeiture upon a final judgment, that was done which is now said to be

be done by the judgment *quousque*; which, according to all the cases, is only in the nature of a process, not to try the right, but merely to enforce an appearance for the trial of the right, as a grand cape in a writ of right works no more than to enforce appearance, and in the analogy of law not working any other effect than that, is now for the first time to be construed to work a dissolution, when it does not appear that there ever was any dissolution of any corporation, upon any judgment or surrender, in which the king granted a new charter, to the destruction of all the prior existing prescriptions and rights of the old corporation.

I also think, that the statement upon the rejoinder of the defendant shews, that the gentlemen did conceive (and they conceive as able men, for I am sure Mr. Bower knew and felt, that it would not be safe to have rested it upon the judgment *quousque*) that the proceedings went further, and that by those farther proceedings we were ousted of our liberties: it is found against them, that there were no further proceedings; therefore, if there is a doubt about the judgment *quousque*, in order to preserve the rights of the corporators, when it seems admitted upon the pleadings, that nothing could work a dissolution but a final judgment—and here is something short of it—we trust the court will add this observation to the rest, and declare we are entitled to judgment upon this issue (which in this respect is a material issue) whatever may be their opinion upon the first issue. The question then is, supposing this to be a mere process to enforce an appearance, whether there could be any power in the king to grant, even during suspension, a new corporation? The word *suspension* implies the idea of existence; and my friend Mr. Bower stated, that this grant of James II. would be to the prejudice of an existing corporation, and of third parties. Certainly not so, if the king had not a right to grant to that third party what he had granted. Now it is clear, from very antient and very respectable writers upon our law, that the king cannot grant to the prejudice of a prior grantee: Bracton, in his chapter upon the power of granting franchises, and in whom that power is vested, states clearly and expressly the law to be, where the king has granted to a corporation liberties which are vested in them, he cannot afterwards, to the prejudice of that corporation, grant the same to another body: *Recurrendum erit de necessitate ad prioritatem impetrationis, et sic ut videtur, in omni libertate concessa in impetratione, usu, vel restitutione, erit prioritas preferenda*. So in cases of markets, fairs, tolls, [Sir Oliver Butler's case, 3 Lev. 220. Keilway. 196] the king cannot grant to the prejudice of a former grantee. The question, then, will be, whether king Charles II. could grant this charter to the other body, during the suspension by the judgment *quousque*? He could not, except upon an idea that short suspension did work an annihilation of the corporation: against which, there is strong and abundant authority in the books. *Non user* does not affect the liberty, nor any prescription depending upon it—Cooper and Andrews, Godbolt 138.—Whilst the integral parts continue, and are capable of exercising their functions, there can be no annihilation or extinction from mere *non user*, or a temporary suspension of their activity. If the king granted upon an idea that two corporations might subsist at the same time, it is clear he was deceived in his grant, and the second grant must be void; because under the charter of Henry VII. and Elizabeth, there did exist a corporation then in Chester. In 12 Mod. 253. [Case of Dartmouth, 1 Salk. 191. 12 Mod. 247. Holt, 170.] quoted by Mr. Serjeant Adair, it appeared, that a surrender being void for want of inrolment, the king's grant, in consideration of such surrender, was held to be void. Therefore, if this judgment does not totally annihilate the being of the corporation, there existed that which in contemplation of law was a complete bar to a subsequent grant, and the grantees must be supposed to have notice of it: then they take, subject to the appearance of the old corporation in the court, and to the court's recording that appearance; or as there existed a capacity and a corporation capable of being put into activity, by a future grant, or by the release or quashing all the process against them till that grant's being made, or release given by the king. And in the case of York, four years after the judgment by default against them, they appeared, and the court said nothing to them, but, upon their appearance,

appearance, admitted them to plead, and the attorney-general entered a *noli prosequi*. The practice of the court (as it was the other day laid down in this court) is the law of the land; the practice of the court is, that upon an appearance doing away that which is in the nature of a contempt, the parties are let in to try their right; the court, *ex debito justitiæ*, must admit them upon appearance; and in the words of the learned lord chief-baron, when he summed up the evidence on the first trial, "then immediately the new corporation became interlopers, and could claim no right to an existence as a corporation in Chester." The liberties had been suspended, but not annihilated; suspended in the hands of the king, not to dispose of to another, but suspended by an order of the court, to be removed out of the hands of the king as soon as ever the parties appear and purge their contempt: therefore, if they had appeared, the court's sentence would have been, to remove the hands of the king from them.

If the charter of Charles II. was granted to a new corporation, they took it as grantees, with full notice of this situation of the old corporation.

Here is no necessity for any *scire facias* to repeal that patent. This grant was to them subject to the revivor of the activity of the old corporation, as a condition in law annexed to it, that whenever that activity was revived, the claim, under the second grant, must vanish and be done away; the grantees take it subject to that revivor, and their grant is gone. Such conditions, in law, are not uncommon:—An implied surrender of a lease upon the acceptance of a new one; of a subsequent charter, inconsistent with a prior one, by the same body; of a market; [3 *Lev.* 222.] where it is said, if a second grant is to the prejudice of another, the patent is void, for in all such patents a condition is implied, that it shall not be to the prejudice of a prior subsisting franchise of the same nature. This second body accepted the grant of Charles II. with full knowledge of the state of the then existing corporation, under the charter of Henry and Elizabeth; and of course, by the revival of the old corporation, that charter ceased and was done away.

Upon the whole, I submit to your lordships, that the judgment by default, is only process to compel appearance, that it produced no effect upon the rights and possessions of the corporation; it only suspended their rights and liberties, subject to a revival in the way in which they are revived; and when that happened, the new corporation could not pretend to any legal continuance.

For these reasons I submit, that on every view of this case, and upon either and both of the replications, the crown is entitled to enter up judgment of ouster against the defendant Amery.

Mr. L A N E.

AFTER what has fallen from the court in the course of the argument, I hope to be excused in attempting very shortly to give some answer to the objection which has been thrown in our way upon the record.

From the words of the replication, "that other persons are to be chosen in such manner as by the charter is directed;" the question put by one of your lordships is, "Under what power?" If your lordships advert to the terms of the charter, as stated in the replication, which sets forth this power of amotion, you will see that the words used are, "as by the said letters patent was before directed:" and if the court will please to look back to the plea, they will there see a mode of election directed, which the defendant himself has thought fit to set forth; this the court will undoubtedly consider as the mode of election to which the replication refers, because the replication is speaking of the very same charter, and is referable in terms to the very same mode of election, which is stated in the plea.

Were it otherwise, I should submit, that after an attempt to gain over of this charter, in which we failed, and after the defendant's neglect—for if he had chosen to avail himself of any thing incorrectly or insufficiently stated by us, he should in his rejoinder have brought it forward, and have denied the consequences which we affect

to draw from any such mistaken part of the charter—after this, as he has not in point of fact done so, your lordships will not attempt to find out defects in the case; and, viewed even with the eagle eyes which the court seem inclined to use in looking at this record, if it should turn out to be defective and bad, it seems to me that the art of special pleading is lost in this country.—

Mr. Justice *Buller*. No; for it was stated truly upon the former record.

Mr. *Lane*. The language of the court, upon a former occasion, induced us as much as possible to shorten the pleadings upon this record; and if the court should now say, that on account of our brevity, and in having omitted to state that which we before stated, we are more exceptionable, and that the record does not come before the court with so much upon it as they wish to see there; it leaves us in that sort of dilemma from which I, for one, feel utterly unable to extricate myself.

I am not aware that in the former record there appeared any part of the charter set forth, which could furnish such conclusion as the court say might by possibility now be drawn upon this record; and I think the court will hardly lay aside the ordinary rules of construction, to make this record bad, unless it should seem to be decidedly so, according to those rules of grammar and fair construction, which are consonant to common sense and common propriety.

I own, from the cursory view I have been able to take since the court threw out the question, I cannot but think, that the mode of election is sufficiently described in the plea, and sufficiently referred to in the replication; and though in ordinary cases you cannot call in aid from the train of one issue, to support another issue, which is substantive and independent; yet there are cases to be found in the books, in which the courts have said, if they see upon the whole record that the party is not entitled to judgment, he shall not have that judgment.

Not being at all aware that this point would be made, I am not prepared upon it; but I think there is a case in *Croke Charles* to that effect in a civil suit. This doctrine also was discussed in the case of *Grant v. Affle*, in *Douglas*; and I believe that cases might be found in which the court have gone the length of saying, they would look to the whole record to see if the parties were entitled to judgment. Without more prefatory apology, for troubling the court with any sentiments of mine, in a case of so great importance, I shall proceed to consider,

First, The construction of the proviso in the charter of Charles II. as that comes first in order upon the record.

It is impossible to suppose the court ignorant of the system of politics at the times in which these charters were passed, or to imagine that they can forget the history of those days in which such arbitrary strides were taken by the crown. The king's intention in granting this charter is obviously connected with the history of the day, which has been so correctly detailed to the court, that I cannot add a syllable to what has been said upon the subject; nor should I think it decent farther to press that which certainly is not upon the record; I mean merely to insist, that the court must collect, that the intention of the crown was to keep in its hands (however illegal that might be) the power of undoing that which had been done in so extraordinary a way.

The very able arguments which were used in the quo warranto against the city of London, shew that the crown lawyers of that day strained every nerve to effect this improper purpose of the crown: and it shews also, and most decidedly proves, that those officers (whose abilities at least have never been called in question) used expressions which they thought fully sufficient to answer such intention. The charters granted at the time this charter of Charles II. was granted to Chester, had some of them similar clauses of power of motion contained in them, and it is not to be supposed, nor will the court intend, but that the officers of the crown were fully apprized of the effect of those words which they introduced into the charter, and certainly will give them credit for at least having used such expressions as they thought

thought answered the purpose. It is for us to consider how far your lordships will follow their example in considering them sufficient here.

There is one clause in this power of amotion which has not been much adverted to in the argument, and strikes me as extremely material, towards the construction of it; that which says, that from thenceforth the mayor, and every one of the corporate officers, *nominatim*, all or any of them, shall be without any farther process removed. Surely if language can convey ideas accurately, this goes the length of at least convincing the court that it was the intention to keep a power sufficient to discharge all the whole corporation, because the word *all* is made use of as referable to every individual member so previously recapitulated.

If your lordships should doubt as to this being a legal power reserved to the crown, perhaps there is an applicable instance, with which this court may not be unfamiliar, in the city of London; the mayor of the city of London must always be approved of by the king; suppose the king should not chuse to approve of the mayor *de die in diem*, and the mayor be a necessary presiding officer at the annual election of aldermen; the consequence is obvious; will the court say that such power is illegal? that must be illegal if the present power is, and the crown may in every charter make some power or other that shall go the length of defeating the purposes of the corporation.

There are, I am aware, some clauses in this power of amotion, giving a power to elect other persons, and it will be said that a sufficiency must be left to constitute an election. But where is the line to be drawn? May the crown remove one, two, three, or how many? does the power of amotion say where the line shall be drawn? if it does not, from what can the court collect it? And again, the words "from time to time," are certainly applicable to a partial amotion, and to the electing in the place of those who should be removed. If the crown removes but one, two, or three, then the remaining officers elect in the room of those who are removed; this clause must be holden referable to that case; it must apply to partial amotions—to the removal of one or more, leaving a sufficient number to constitute an election. The words are nonsensical as applied to any other view of considering the question; and if they do not so apply, they seem intirely ineffective; so construed, they have full effect. Your lordships will hardly presume, that the crown reserved to itself an illegal power, but you will presume that the king does not intend to do wrong, and therefore will not hold this power to be illegal, although no instances at any other time may be found in which clauses of this kind have been introduced into charters; and the court will certainly lean in favour of them, if they can be supported. No doubt, the object of the crown was, to preserve a complete dominion over the corporations of the day; and it did every thing in its power to effectuate that intention.

The court will then consider how far this is a legal proviso; and in so doing, whether those who have accepted the charter with this proviso contained in it, can object to it as not being legal; because this corporation have taken a charter containing a clause which goes the length of defeating the freehold which this man had as an alderman of Chester; shall it lie in their mouths to say we have accepted that which we will take as far as it suits our purpose, but no farther? Surely the crown has a right to say, you must take this altogether; you must take all or none; you cannot accept it partially: you cannot take it without that clause, empowering me to remove you all again at pleasure.

If they accept it, and act under it with such a clause, it does not lie in their mouths to object to it afterwards as illegal, even if it be not a legal power. Your lordships have heard much said about the charter becoming void; and a variety of cases have been mentioned to the court, in which the doctrine is very much canvassed, how far in the case of the king, as different from a private subject, a charter or grant shall be void. In those cases, your lordships will find it is said, that if the king is deceived, the whole grant is void.

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In the present instance, I argue, from the intention which the crown must have had, on a supposition that it did not intend to do that which is illegal, that the king must have been deceived if he has done that which is illegal, and then the whole grant is void; and so if granted on a false suggestion, or if containing a repugnant saving.

Your lordships will find, in two or three of those cases, that if there be a repugnant saving, the whole shall be taken to be void in the instance of the crown. Now it is clear, the crown must have been deceived, because it was the intention of the crown to keep in its hands the power of displacing. There is a case in *Trin. 9 Henry VI. plac. 30*, page 28—and also one in *Trin. 1 Henry VII. 26 plac. 1.* in which this doctrine is also laid down, and upon which the other cases rest, with respect to the interest of the crown being different from that of a subject, and the whole grant being void. It is said in 1 *Coke*, 43d b. that if the king's grant cannot take effect, according to his intention expressed in the grant for that cause, his grant is void, and shall not be construed to pass other than he intended to grant: when the king is deceived in his grant, the grant is void.

In another place, they say the king had granted such an estate as he could not by law grant; and so far as much as the king is deceived in the law, for this cause his grant is void.

Now, supposing I am right in insisting, before the court, that the whole charter of Charles II. is void; I submit, that upon the issue of *non concessit*, the crown is intitled to judgment; because any thing which goes to shew that the whole of the letters patent, or grant, are void, goes to shew that the king had not granted; and there are cases, from which it appears, that no scire facias, nor any other proceeding, is necessary, in such instance, to avoid the grant.

Now, whether this be a legal power or not, I submit to your lordships, that in fact, as it has been exercised, it is sufficient. The words of the clause are, that "all or any" are to be removed, without any further process, when the king shall, by an order in council, declare them to be removed, and his order shall be signified: so that the order of the king, and the signification of it, is determined to be *ipso facto* an amoval; to have the effect, in other words, of an actual ouster. The court will see this from the expressions used in the clause itself; and they will therefore thence necessarily collect, that the order of amotion itself actually displaced the corporation. The *significavit* seems to have been introduced for the purpose of notifying to the parties what the order was, that they might not afterwards usurp upon the crown; it is found, in fact, that this order was duly signified; and it thence necessarily follows, upon this issue on the record, that the persons, the objects of the order, were, in point of fact, removed.

It is not a pleasant thing to cite against an opposite party, the words he may have made use of in a former argument: but I remember the gentleman (who, on the other side, conducted this cause with no small ability at the trial) making use of an expression, which, at least, from his mouth, convinces me what his sentiments are upon this occasion. It was said at the trial, that the consequence of the jury's finding the signification of this order, was *an absolute dissolution of the corporation under the charter of Charles II.*

Mr. Bearcroft.* That was said to the jury.

Mr. Lane. Without saying more upon this clause of amotion, which I confess, as far as my poor judgment goes, I do not think so strong a part of our case as the other issue; I will proceed to speak upon the effect of this judgment *quousque*, in the second replication, as standing upon the record.

Your lordships will find all the authorities which were used in the quo warranto against the city of London, 16th, 17th, 20th, 30th, and 31st pages of sir Robert Sawyer's argument. I was in hopes to have found the form of a seizure *quousque*. I think there is one in Riley's *Placita Parliamentaria*; but I am pretty confident, from the quo warranto, in page 29 of sir Robert Sawyer's argument, that it runs thus; "That the liberties, &c. shall be seized into the hands of the king, until

"the court shall further order." I trust the court will consider that this seizure is nothing more than process to compel an appearance; it is not treated as any thing more in the various arguments upon that subject which have been adduced in former times, and principally in the time of Charles II.

Your lordships know, that in the instance of a corporation, you may proceed to compel an appearance by distress infinite; and it may be difficult to suggest to the court any other legal means by which it can be done. Certainly this seizure *quousque*, which must be a seizure in point of fact, whether by writ of seizure or otherwise, is for the mere purpose of compelling an appearance, till there is an appearance. I think the court will hardly say, it is possible for a replevin to be made; for your lordships know the form of replevin in this case, as in all others, is, that the thing taken shall be restored into the hands of the party, upon giving security to appear to prosecute his suit, or as the case may be, and as there can be no replevin till seizure; and, as in this case it is allowed that the corporation might have come in, and by appearance have cured their default, that goes the whole length of allowing, that this corporation, as to its corporate office, remained in existence; for otherwise it could not have come in to have replevied; it must necessarily have remained in existence, or it could not so have done.

But the order of the court in this judgment *quousque*, which is stated upon the record, and which I shall take to be the formal state of such judgment, is, till the court further order: and in the quo warranto, page 16, sir Robert Sawyer uses an expression, arguing for the crown, which goes the whole length of supporting my position; he says, "Where, on default of appearance, a seizure is made" (he does not say *where a seizure is awarded*, but *where a seizure is made*; which must be by an actual taking into the king's hands) "which is in the nature of a distress, to bring in the party by putting him out of possession of the liberty, till he appear" and replevy, the court, if the defendants come in time and pray it, may deliver "them the possession upon replevin." This confirms what I stated to be the form of a writ of seizure *quousque*, which must be till the court further order, the court having a power, with respect to the delivery of the liberties of the corporation, which, in the case of a final judgment, is in the king alone.

It was asked by the court, whether any instance had existed of writs of seizure in *quousque* judgments; I believe the court took down the names of them; there were three instances in the notable cases of those times. The form of the writ does not appear upon the roll, and therefore we have to collect from the books upon the subject, what the form and language used by the court in such writs of seizure must be taken to have been.

In the case of York (which is a material case) the defendants there came in some years after there was an interlocutory judgment in 36 Charles II.—they had a new charter in 1 James II. (this appears upon record, and we had it in proof at the trial) and the defendants, in quo warranto, in 4 James II. came in, replevied, and had a writ of restitution. This they had, your lordships see, some years after: the parties may at any time replevy; they may enter their appearance, and cure their default, unless in the instance in which the crown has proceeded beyond a seizure *quousque*: if the court has proceeded to a final judgment, there, perhaps, it may be different, because then the parties must take according to that modification which the pleasure of the crown dictates; but it is not so if they come at any time before final judgment and seizure thereupon. The corporation may make their appearance, and cure their default; and there must be something done farther than a writ of seizure *quousque*; as lord Holt says, in the case of the king, *v.* the city of London, as reported in Skinner, 310, that if the corporation does not appear upon summons, the franchise shall be seized into the king's hands, *nomine districtionis*; and if it does not come during the eyre, it was lost, 2 *inst.* 282. he says, that the liberties are of three kinds; then he specifies them, and goes on to add the same law of a judgment of seizure, as forfeited, for this amounts to a judgment of ouster; of a seizure *quousque*; then he goes on to cite that part of the case which

was

was cited before, as to the propriety of the judgment, in being a judgment of seizure, or a judgment of ouster. I contend, that as the form of this judgment is, that those liberties should remain in the king's hands till the court further order, that the king had no power to dispose of the franchises; they were, perhaps, in abeyance (if it may be so called, being only suspended for a time) that the king could have no power over them; for if the king had such a power, it would be impossible for the party to have a right to come in, and, by his appearance, cure his default: upon his coming in and curing the default, a writ of restitution is ordered; but if the king, in the mean time, could have given away the liberties and privileges to another, it would be impossible for the court to do that which the law says they may do, when the party has cured his want of appearance, namely, give him a restitution of his privileges again.

The court could not themselves make any order till final judgment; unless it was this order of restitution upon the parties appearance; upon a final judgment, the court would order, the court alone having the power to order, that those privileges should be seized into the hands of the crown, '*donec Rex aliud præceperit*,' for then being forfeited and gone, the court can exercise no farther dominion over them; but they pass by the judgment of the court, that they should go into the king's hands, from whence they originally issued; and then, and not till then, has the king the power of moulding them at his will, and doing with them by way of re-grant, or putting them forth again, according to his pleasure.

The instance put of an appearance curing a default, shews most clearly, that the court only has the power, and the king no such power, as it must be contended on the other side that he had; else by consequence this charter of Charles is void, and good for nought.

Even supposing there had been a final judgment, without travelling so far into the subject as the learned recorder did yesterday, in which I trust he convinced the court, that even after a final judgment, there could be no such thing as a forfeiture of the existence of a corporation; thinking with Mr. Erskine, that it is not by any means necessary for us to go so far, at least we may insist, that without a writ of seizure there was nothing in the king's hands to grant; supposing a writ of seizure necessary upon a *quousque* judgment, none appears to have issued, and they are not displaced till such a writ of seizure actually makes a transfer of the privileges from the corporation into the hands of the crown.

Even suppose the crown to have gone on to a final judgment, which had pronounced those liberties to be seized for ever, or the corporation to be ousted of them; I still contend, that till a writ of seizure, the crown could have exercised no dominion upon those liberties and privileges.

Your lordships will see a variety of cases in the quo warranto against London, in which those writs of seizure are stated; there are two in the cases of Winchester and Oxford, in the 29th and 30th pages of sir Robert Sawyer's argument. There is a writ of seizure in Winchester, in 33 Edw. I. directed to the sheriff; afterwards the city compounded, and a writ of restitution issued. There is another in the instance of Oxford, where the liberties are stated to have been seized by writ of seizure in the 32d Henry III. the king in the same year pardons them, and grants them restitution, and there was a writ to the sheriff to put them into possession, and upon that, restitution was made; which shews clearly, that the writ of seizure would have transferred them from the hands of the corporation; but that till an actual laying-on of hands by the crown upon the liberties and privileges, nothing goes from the corporation.

It was said, and seemed to be with some effect for a moment at least, that there could be no seizure of an incorporeal franchise. These writs of seizure upon final judgment completely shew the contrary; for these franchises and liberties are actually seized into the king's hands, and are the subject as well of a writ of seizure as restitution afterwards, and therefore beyond all question they could be seized into the hands of the crown, although incorporeal hereditaments; and shew too, that

these which are called nonentities, may be seized into the king's hands, for the sake of giving him a power of modifying them, or granting them out again at pleasure.

In the case of Malmesbury, in which it was said there had been a reversal of the judgment in parliament, there was no appearance; in that case, on what ground the reversal in parliament was had, it is impossible for us to know; from conjecture it might be, because there was a final judgment where there had been no appearance, or because they did not proceed by distress infinite to compel an appearance, as the law directs them to do; that might be the reason, for it seems to be a sufficient reason in law; perhaps it was, because there was no award of seizure upon the *quousque* judgment: when we find upon a record on error brought, that the judgment was reversed, we are to look to those matters which seem to us objectionable, on account of the informality of the proceedings, and there does not appear any award of process on this *quousque* judgment.

It was necessary that the crown should be put into possession legally; the judgment only gives a right to this writ of execution, it is the writ of seizure itself which puts the crown, as in other cases the subject, into the *de facto* possession of the thing seized.

I did state that this could not have the effect of being a suspension of the corporate capacity, because then this corporation could not have come in again and replevied, which, from all the cases it is clear, might have been done, and in the instance of York was done, at the distance of several years.

There was another instance (the case I do not immediately recollect) in which I think they came at a greater distance than four years, and replevied; because there had been no seizure into the king's hands as forfeited, the king had not exercised dominion over the franchise, and till he had, I submit to your lordships, the default might be cured by appearance.

When the motion was made upon this subject originally by Mr. Bower, he stated very correctly, that when they were in the king's hands, he had then a power, by new grant or letters patent, to give those privileges away which were vested in him by the judgment. Certainly, if the crown had any powers vested in it by the judgment, the crown had a power of granting them away; but we say there was nothing in the crown to grant, that the *quousque* judgment gave the crown no power at all, and that by consequence the crown could not legally exercise any power, and that there was nothing for such power to operate upon.

I trust the court will be convinced, that it was not intended to oust this corporation by those who brought this information; the form of which shews that, because it is brought against the corporation itself, and not against the individuals; and it is the received doctrine as laid down in the argument in the *quo warranto* against the city of London, and in Lord Hale's common-place-book, that the information must be calling upon *individuals* to say why they have usurped the franchise, not calling upon the *corporation* to say why they have usurped it, in the same breath calling them a corporation, and then asking them why they have usurped to be a corporation.

The very description allows the corporation to be the character you sue, and having allowed it upon record, you cannot afterwards contend that they are not that character which out of your own mouth you have allowed them to be. That is a position which was uniformly adopted on each side in the *quo warranto* against the city of London, and does not seem to have met with an answer in any of the arguments used in that case; and I cannot help repeating, that the form adopted in the present instance does shew most clearly, that it was not in the intention of the crown, by this information, to seize the franchises of the corporation for an usurpation; that could only be effected by some of those ways already stated, or at least by some office found, or other matter of record (it is immaterial by which way) but it must be upon record, that those liberties are found to be seized into the king's hands, and there must be the actual conveyance of them into the king's hands in consequence. In 9 *Coke*, 95, 96, it is said, that if the king's title be
found

found by office to an incorporeal inheritance, the king shall not be in possession before seizure. Now whether upon office found, or whether this be a subject upon which no office was necessary, is perfectly immaterial, for the same doctrine applies; that the king could not before seizure be in possession. In *Saville*, 70, it is said, though the king be seized for a condition broken, which determines the estate, he cannot grant it to another till breach is found by office. So that after having granted (which it appears upon this record that the crown had done) letters patent, incorporating a set of persons, as done by the charter of Henry VII. the crown could not, till office found, or at least till those franchises were in him again, regrant them, or send them out again from him. In *Stamford, de prerogative, reg.* 77. it is said, if on petition *monstrans de droit*, or traverse, the plaintiff recovers, judgment shall be given *quod manus domini regis amoveantur*, and thereupon a writ of *ouster les mains* goes, which is to the effect, that the plaintiff shall have his lands seized by the king out of the king's hands. Your lordships see, therefore, that in all these cases, in every proceeding where there is an actual possessory transfer of the franchise, or of the right, although in an incorporeal hereditament, in every case there is a writ to effectuate the judgment of the court, whether proceeding by petition, traverse of office, or otherwise.

With respect to any argument that may be used to maintain a contrary position, from the case of the mayor of Colchester *v.* Seber, I will shortly say, that any opinion which might fall from the court in that case, applicable in that view here, was on a subject not before the court for their consideration; it does not seem to have met with their consideration, nor is there any judgment given at any length on the point, merely sufficient to raise a doubt upon the subject, for the words are, "it may be" different perhaps in the case of an information against the corporation itself.

If I am right in contending that the effect of this *quousque* judgment was not to transfer any of the liberties or privileges into the hands of the crown, let us consider how the case stands, supposing the fact, that the king had not the power of granting them away, if he has nevertheless taken upon himself so to do; I cannot help resting upon that, which has in various shapes been pressed to the court before, and as it should seem with much effect, because in my poor apprehension it does seem of the greatest consequence to the determination of this cause: it is what reduces the opposite party to a sort of dilemma; namely, this:—the charter of Charles II. either is granted to the same corporation, or it is not. It could not be granted to the same, that is, the old corporation, because seven or eight are excepted; it would operate as a disfranchisement of the number not included in it, and therefore the citizens could not, in point of law, accept it: so that it could not go to the old corporation. Neither could it to the new, supposing we are right in contending that the king had no power to grant to a new one, till seizure into his own hands; and which did not, in point of fact, happen upon this judgment *quousque*. It is not affected to be granted to the same body—there is an exception of seven or eight—therefore it is not to the same body: and I submit to your lordships, that it was not, in point of law, possible to grant it to a different one.

I do not mean to repeat the arguments of other gentlemen, but I rely upon those arguments to shew, that, by reason of the seven or eight persons being excepted, the charter could not be supposed to be given to the same body; and it could not, from the effect of the judgment *quousque*, be given to a different one.

I will just trouble the court with reading the case of *Butler v. Palmer*, to shew, that, supposing the judgment in this case did not annihilate the corporation, no new corporation could be created. The case has been mentioned; but there is another report of it in 12 *Mod.* 247:—The plaintiff brought case for a false return to a mandamus, commanding him to swear Harris to be mayor of the town of Dartmouth; and a peremptory mandamus was moved for. It was resolved by the court, that if there be an old charter surrendered, but the surrender not enrolled, and a new charter in consideration of the surrender granted, the second charter is void: or, in other words, if the first charter be not completely done away, the

the second charter is void; and if there be any other persons in the new charter than were in the old charter, any law made by them is void, because they act under a void charter; but is valid, if made by those only who were members under the old charter, because then they act by their first charter, which is still good. There is a very short note of another case of *Piper v. Dennis*, in reports in the time of lord Holt, 170, upon a quo warranto against the town of Lefkard, in Charles II.'s time: they surrendered their charter, which was not enrolled till king James II. who, in consideration of the surrender, granted a new charter to them, *per curiam*—The second charter, being in consideration of a void surrender, was also void.

I submit farther to the court, that the old corporation could not accept of any charter at all, neither consistent nor inconsistent; for their liberties and privileges were, I conceive, in suspension or abeyance; if they were in abeyance, then the old corporation could not take; if not in abeyance, the king could not by possibility grant the same privileges to any other description of persons; all are not in a capacity to receive—the exception of those few would be holden to operate as a disfranchisement of such persons, and therefore they were not in a capacity to receive; and all must receive, if any, because a part of an existing corporation cannot accept a charter: but I do not know whether it is necessary to insist much on this before the court, because it does not seem to me that we are in want of this argument, or that we need rely upon the restoring charter of James, as at all auxiliary to the point we mean to contend before the court.

It is not wanted, if we are right in contending, that the charter of Charles II. is an utter nullity, and that the crown had no power to grant it. Upon the record, as stated in the last replication, to which no such exceptions, as applied to the first, have been taken; it appears, that the charter itself is void, and that there not having been any final judgment, the crown has done that which the crown could not do in point of law. It is impossible for the court not to see upon this record, that there is no usurpation whatever, because it is found, and appears upon the record uncontradicted, that the charter of Henry VII. and the *insepimus* charter of Elizabeth, were in force and existence at the time of the information in quo warranto; if so, it could not be an usurpation to act, because those charters, at least, gave the corporation a power of acting as a corporation, without its being said that they usurped a franchise; therefore it appears upon the information itself, that it ought not, in point of law, to be supported.

I beg pardon for taking up so much time; I will hasten to conclude, by submitting to the court, what seems to be the effect of the whole of this charter, and this finding, because nothing I can say will add a ray to the great light which has been thrown upon the subject by the very learned gentlemen who have preceded me. Supposing the charter of Charles II. was granted to the same persons, and if to different persons, for the reasons I have assigned, it must be bad; if it was to the same body, there is an end of the question—for they have accepted the charter of James II.

I remember, when this cause was tried the first time, that the learned judge who tried it, did state some doctrine, which was afterwards taken exception to, as perhaps carrying the law upon this subject much farther than it had ever been carried before; and the learned judge's opinion was attacked, because he took for granted, that the final judgment had not that effect upon a corporation, which, perhaps, it may be doubtful whether it had or not.

The present chief-baron then said, that if before the judgment of ouster, the king had sent his charter down to certain persons, not members of the old corporation, and under such charter they had assumed the power of, and to act as, a corporation there, that charter could not have any effect. And he said, he did not see much difference between that case, and the case of the old corporation being restored again, and in possession of their old corporate rights.

Now, whatever that learned judge said, as applicable to the case of a final judgment, and an actual ouster, will apply, without controversy, to the case of an interlocutory

terlocutory judgment, where there has been no ouster, because it is not assuming that in which the learned judge might be supposed by some to have erred; but merely taking for granted, that the liberties were not destroyed by an interlocutory judgment only, and which I presume no gentleman will be hardy enough to controvert.

It was said at the last trial, that till final judgment, there could be no ouster; and I am not in fear of any authority to controvert that position.

Your lordships have said, and there can be no doubt of it, that there cannot be two corporations in this place for the same purpose; it does appear from these two charters, that they were for the same purpose completely; for, exclusive of the general purposes which are marked out by them, it is a grant to the corporation of the city, to make magistrates for the city. What! are two corporations to have the government of the city, and to make magistrates for the city! How can that be supposed? The court must necessarily intend, upon these charters themselves, that they were for the same purposes; and if I am right in contending, that the old corporation was in existence at the time of granting the charter of Charles II. there are two corporations created for the same purpose, and then they cannot both stand—the second must necessarily fall to the ground; they need not be for all the same purposes: it will be no answer to tell me, there are some respects in which they are not for the same purpose; for this purpose, at least, they were the same; and then, I submit to your lordships, there could not, in point of law, be a creation of any such new corporation. I do not think I shall be told, that there may be any number of corporations created; the confusion which would be introduced by that doctrine, must induce the court not to be forward to adopt a construction which may favour such a possibility.

Therefore I submit, that either under the clause of amotion, this corporation, created by Charles II. is dissolved in point of law, or if not that, upon the finding, it is gone in fact; and that, therefore, according to the opinion of the present lord chief-baron, when he tried this cause, they could not possibly renew themselves; which opinion seems to be built upon the most sensible and substantial foundation: then the corporation is gone, so far as it rests upon the charter of Charles II. for support.

The charter of Henry VII. is admitted to be in existence at the time of the *quousque* judgment. The charter of James II. affects, in terms, to restore that corporation; it restores every corporate officer by name, with the exception of one of the sheriffs, who was dead. And I contend, that that charter, supposing it had any effect, released all the incapacities of the corporation, that it did displace the charter of Charles II. and revive the politic capacity; if that politic capacity could have been at all affected, a point which I do not give up, because it seems to me maintainable against all the powers of argument; if, nevertheless, it was affected, this charter has completely restored the politic capacity. As it appears therefore clear, that this charter of James II. was accepted, your lordships will not presume, that the officers renewed themselves under the charter of Charles II. and that there are two corporations in Chester. There must, therefore, be an end of the charter of Charles II. even upon this record; thank God, the only place now left in which it affects to have any thing like an existence.

Mr. Justice Buller. As to the case of *Astle v. Grant*, that does not apply to the point that went upon the principle you mention; that if it appears upon the face of the record, that the plaintiff is not intitled to recover, he shall not have judgment; the defect there was upon the face of the record. What I want to know is, whether, if the replication be substantially bad, the court can at all look into the plea?

Adjourned.

June 21st, 1787.

Mr. T O P P I N G.

My lords,

IT is now my duty to submit to your lordships what I apprehend to be the proper answers to the objections raised, by the learned judge, against the pleadings in this cause :

The first objection is, " That the mode of electing aldermen does not appear on the first replication ; therefore the court cannot see that the conclusion is rightly drawn, viz. that the power of electing aldermen ceased in consequence of the act done by the crown."

[Mr. Topping then proceeded to state the pleadings.]

I submit to your lordships, with respect to the plea, that it is not confined to the election of an alderman, in the case of death, but goes to the alternative, either of death or removal. It then states, that in the event of death or removal of an alderman or aldermen, the right of electing to the vacant place or places is in the mayor, aldermen, and common-council, of the city.

The mayor, aldermen, and common-council, appear then upon the defendant's plea to be the only persons in whom the right of electing aldermen, in the city of Chester, resides. That is an allegation stated upon the defendant's plea, and there is no other allegation upon it stating the right to be in any other persons.

The replication admits the matters alleged in the plea ; but it goes farther, and adds, that the king did something more, because after these previous provisions of the charter are set out in the plea, it goes on to say, the king *farther willed*, that he should have power, by order in council, to remove any one or more of the aldermen or common-council ; and that they should be *ipso facto* removed by the signification of such order. Then it concludes with these emphatic words, "*any thing contained in these letters patent to the contrary notwithstanding.*"

I shall submit to your lordships, that if the replication had stopped here, if the clause upon which the objection is stated by the learned judge had not been inserted at all in the replication, but had been altogether omitted, still the replication would have been perfectly sufficient to warrant the conclusion of law, drawn by this replication.

The clause upon which the objection is stated, is (I submit) mere *surplusage* : it is not of the essence or substance of the replication ; because it applies only to such acts and orders of removal upon which *vacancies* might be filled up. But the order of removal, stated upon this replication, and the act of removal, is such an order and act of removal as prevents all possibility of making future elections, because *all the electors* are removed.

I rely upon this most confidently, that if your lordships see upon this replication, that the clause set out is immaterial—even if the court should think that any objection could arise upon the clause itself—still I submit to your lordships, that it does not avoid the replication : it is irrelevant ; it neither adds to, nor takes away, the substance or effect of the replication ; and if the omission of the clause altogether could not have vitiated the replication, the insertion of it cannot do so.

But supposing the clause should be thought material to the replication, I should then submit to your lordships, that the reference to the mode of election is clear and obvious.

It will not be contended, that it was necessary to set out in the replication, over again, the power of electing aldermen, which was stated in the plea ; when the defendant himself has stated that power of election in his own plea. The words of reference in the replication to the plea are these : "*in such manner as was before directed by the said letters patent.*" Your lordships here will bear in mind the previous words in this replication, namely, " that the king farther willed," after all the previous provisions set out upon the defendant's plea ; then it concludes, "*in such manner*"

ner as was before directed by the said letters patent." The previous provisions of the charter are set out by the plea: the replication connects those previous provisions set out, with that replication: the words "in such manner" are not the words of the pleader, but they are the words of the clause itself, which directs that upon any amoval, in a case where a new election can be had, that election shall be in such manner as the king had before declared the election should be in his letters patent.

All that is necessary, however, upon this point, is to refer to the mode of electing aldermen. That reference I take to be clear: But I again submit to your lordships, that this clause is altogether irrelevant, and immaterial, and that it is mere surplusage. It does not apply to the exercise of a mere power of amoval, such as is stated upon this record. If it had been omitted altogether, it could not have hurt the replication; and being inserted, it cannot hurt it.

But a most satisfactory answer, I conceive, has been given by Mr. Lane: that if this charter of Charles II. had contained any other power of electing aldermen than that which the defendant has set out in his plea, and which could be resorted to, in case the mode stated in the plea could not, then the defendant should have stated a fact upon which the conclusion of law drawn by the replication should not follow. As for instance, that although all the aldermen and common-council were removed by the king, yet that the charter contained a provision, that they being removed, the power of election should devolve to *another* body. This, however, the defendant has not done: and with respect to the doctrine of intendment after verdict, I take it to be clear and settled law, that nothing can be intended after verdict, but what will support that verdict.

With respect to the objection to the second replication, I understand it to be, "that it does not appear with certainty, upon that replication, in what charter the power to make the order in council, stated in that replication, was contained: that the court cannot look at the first replication to find that out, and therefore the second replication is bad." I believe I am accurate in stating the objection made by the learned judge.

My answer to this objection is, that it is perfectly immaterial to what charters that order in council refers; because upon this replication the existence of the order, in point of fact, is not material to any conclusion of law drawn by the replication; and therefore the setting it out upon the record, is mere surplusage also.

If the king had never made any order in council at all, such as is stated in that replication, or if he had no power to make any such order, it would not hurt the replication: the order is not necessary to the validity of the replication; the facts alleged, independent of it, are sufficient to warrant the conclusion of law drawn by the replication.

What are the facts stated upon the replication? The first is a charter of Henry VII. incorporating the mayor and citizens of Chester. Then a charter of Elizabeth, confirming that charter of Henry VII. by *inspeximus*; an averment that those charters were in existence and full force at the time of an information which is afterwards stated upon the record.

The information, the *quousque* judgment upon that information, and the charter of restitution, are then stated. The acceptance of that charter is averred. There is an averment of the identity of the information and judgment; and from those facts the conclusion is drawn, namely, that after that charter of pardon and restitution, the old corporation were admitted to their antient estate, and the new corporation superseded.

I should be glad to hear from my friends, what possible connection this order in council has, either with the charter of restitution which follows it, or with the conclusion of law drawn by the replication. The charter of restitution neither refers to it in terms nor in substance: It proceeds upon this idea; that the king, willing to remit the *quousque* judgment, does by his pardon under the great-seal release that judgment, and restores and re-grants to the citizens of Chester their antient constitution.

tution. There was no power conveyed by the order in council, to enable the king to grant a charter of restitution: that order was not necessary to give the charter of restitution operation; unquestionably, therefore, it has no reference to, and is not at all of the essence and substance of, the plea. Any other matter, as well as this order in council, might have been stated just as much to the purpose, as to the conclusion of law drawn by it.

I apprehend it to be a clear principle of law (I speak with great diffidence, when I speak upon the subject of special pleading, for I do not profess to be a special pleader) that where any immaterial fact is stated upon a plea or replication, no conclusion of law follows or can follow from it; for the court look only to such facts as are material and relevant upon the record. This order of council is not material: it is not relevant to the conclusion of law drawn by the replication; namely, that the charter of Charles II. after the charter of restitution, was void, and of no effect. The order of council has nothing to do with it, one way or the other.

This appears to me to be a sufficient answer to the objections which have been made, by high authority, to the first and second replication.

There is a third question I understand to be hinted at by your lordships; namely, Whether, supposing each replication should be bad in itself, the court can look at all the facts contained in them, so as to give judgment upon the whole record for the crown, when the two replications made by the crown are severally bad?

Before I speak to this question, I would remind your lordships, that the present application to the court is in the nature of a motion in arrest of judgment; therefore no objections of form can be now made: all defects of form, I take it, are cured by the verdict: and I submit to your lordships, that nothing can be intended so as to overturn that verdict. It must not be forgotten, too, that the present application is made, by the defendant's counsel, upon the whole record, for judgment for the defendant.

The objection is, that the court cannot look at the whole record at once. I profess to your lordships, when I first heard the objection, it struck me to be a new doctrine, as applied to this sort of subject. I have always understood, that courts of law could not travel out of the record before them: I have always been taught to believe, that the attention of the courts and judges was to be confined directly and pointedly to the record before them; and that they could take judicial knowledge of such facts only as were alleged in the pleadings of the parties. Indeed, if I do not mistake, some animadversion has fallen upon a great and venerable character (whose absence from this court, and the cause of it, I lament as much as any body) for having extra-judicially, as was said, travelled out of the record before him: but I never heard it said, that the court were not to look at all the facts stated upon the record, and to see what was the conclusion of law which followed from those facts so stated. I contend, that judgment must be given *upon the whole record*.

If any fact stands upon this record, found by the jury, or admitted by the pleadings, inconsistent and incompatible in law with that title which the defendant has set up, I contend that he can never have judgment upon this record. There are many authorities to be cited upon this subject; and the application of them, I think, I shall shew most correctly presently.

In 8 Co. 93, *Frances's case*; where the plaintiff's title was destroyed by the replication, yet he had judgment; for the count was good, and the court say, "So that upon the whole record it appears, upon which the court ought to judge, that the plaintiff has a lawful term in the land, and that the defendant has taken his cattle wrongfully;" and therefore judgment was entered accordingly.

In the same book, 163, it is said, "Although verdict, on issue tried, be given for the plaintiff, yet, if on the whole record it appears that the plaintiff has no cause of action, he shall never have judgment."

In 4 Burr. in the case of the king v. *Abraham Heath* (the Helstone case) all the issues upon the record were found for the defendant. The motion made by Mr. Dunning

Dunning was, that, notwithstanding all the issues were found for the defendant, yet upon the whole record it appeared, that the defendant had no title, and upon that rule there was a judgment of ouster against the defendant.

I have cited these cases to shew that the court look at the *whole record*. If the court is to look at the whole record when they are to pronounce a judgment, I should be glad the gentlemen will point out what part is to be omitted, or withdrawn from their consideration. It would be a singular thing, to say that the court should omit looking at some part, when the law says they are to look at, and to give judgment upon, the whole of the record. I shall not trouble your lordships further upon this point: I think it unnecessary; because I contend before your lordships with the fullest confidence, that these replications, severally taken, are substantially good; that no objections, which will stand the test of argument, can be taken to them. And, indeed, my lords, I cannot but consider the situation of the prosecutor's counsel to be singular, when it is remembered, that we are arguing objections, in this stage of the proceedings, that have formed no part of the ground on which the defendant's counsel moved for judgment for the defendant; and upon which objections not one word has been said by the counsel on the other side. The replications being, my lords, as I contend, good, and the court being to give judgment upon the whole record, what are the issues found?

Before I apply myself to this part of the case, I would observe to your lordships, that the proceedings in quo warranto bear no analogy to suits between subject and subject.

In an information in quo warranto, the defendant is what the plaintiff is in an action against another person. The defendant is the actor upon this record: he is what the plaintiff is in suits between subject and subject. The king, by his prerogative, has a right to call upon any man, who exercises a prerogative-franchise, to shew his title to that franchise. The king has no need to set out a title in himself, because all franchises are derived from him, as their source and fountain: he has, therefore, a right, as it were, to file a bill of discovery against the defendant, and to compel him to shew his title to the court. He must shew a complete title, and he must shew that complete title at once. That I take to have been clearly held in the case of the *king v. Leigh*, reported in *Barrow*; where it was held, by Lord Mansfield, that the defendant must shew a complete title at once, by his plea, and that he could not resort to any thing else contained in any other part of the record, in order to bolster up that title.

The objection, therefore, as made by the learned judge, that it was not competent, in some cases, to call in the assistance of one replication, in order to aid another, may be perfectly true, with respect to pleadings by a defendant, in informations in quo warranto; because the law, as laid down in the case of the *king v. Leigh*, is clearly this; that the defendant must, by his plea, shew himself completely possessed of, and entitled to, the franchise which he claims; and he can resort to nothing else but that title, so disclosed by his plea.

But I apprehend that this has no reference whatever to pleadings by the king. Let the replication contain as many different matters as it will, the defendant is bound to answer to all: and if, in the answer which he sets up to any one of those, he fails in shewing that his title is consistent, there must be judgment against him. The king's plea cannot be objected to on the ground of duplicity: he may plead as many matters as he will (so say the books;) and the defendant must answer to them all. If the facts, then, cannot be answered, so as to support the title set up originally by the defendant, the crown must have judgment upon the record; because, if the defendant has no title to the franchise, it must of necessity be in the crown.

In this case, the defendant has attempted by his rejoinder to answer the facts alleged by the replication. With respect to the first replication, he denies the signification of the order in council; and with respect to the last, he sets out a final judgment, the operation of which, he says, is to dissolve the corporation.

Now, upon this answer given by the defendant to the replication for the crown, what are the issues found by the jury? They are both against the defendant:

In the first place, That the order was signified; and,

In the next place, That there was no final judgment dissolving the corporation; consequently, I say, there was no dissolution of the corporation.

The next question is, Are those material issues? for, according to the doctrine laid down in the case of the *king v. Leigh*, before cited, if any one material issue upon the record is found for the crown, the crown must have judgment. Then, who can read this record, and say, these issues are not material? When a power is reserved in a charter of the crown, to remove all the aldermen of a corporation, when that power has been exercised, and the aldermen removed, and no restoration subsequent to that actual removal is stated upon the record; is not that material, when the defendant states his title to arise from an election by aldermen, who appear upon the record to be previously removed, and do not appear to have ever been subsequently restored?

It is not only not alledged affirmatively, that they were restored, which is enough for the purpose of any argument, but the *negative* also appears incontestably; far after the order of removal was signified, and the actual removal by that order took place, the charter of restoration is stated, which comes in and restores the former body to their antient rights.

Will the court then *intend* that there has been an acting under the charter of Charles II? The charter of James is stated upon the record to have been accepted; if the court make any intendment, it must be a legal intendment, namely, that the parties have acted as by law they were competent to act.

This leads me to consider the grounds upon which Mr. Bower has submitted his claim to judgment for the defendant.

The first is, That the act of amotion, stated upon the record, was not justified by the charter, and so the corporation was not dissolved.

The second is, That it appears upon the whole record, that at the time of granting the charter of Charles II. there was a judgment against the corporation, suspending its functions; that during this suspension the crown might create a new corporation; that it did so by the charter of Charles II. and consequently the charter of restoration did not operate.

I did not understand, at the time when the motion for this rule was made by Mr. Bower, that he made any objection to the legality of the power; it seems however, that has since been taken up by somebody. But supposing it to be legal, then it was contended that the power was not pursued in the order of removal. Whether the crown can reserve in its grants of incorporation, a power of the description contained in this charter, I think it is not very material, on the part of the prosecutor, to contend. Large and boundless as this power seems to be, I should incline to think that it might be argued, and with some colour of authority, that it was legal. It is a maxim of the law—*cujus est dare ejus est disponere*.

That I take to be true, in cases of grants from the crown, though not so with respect to grants from subject to subject, the crown may annex, in a grant of a fee, a condition, that a person shall not alien; that is laid down in *Bro. tit. condition. plac. 82—Bro. prerog. 102 and Cor. Litt. 223*.

But it is not the interest of the prosecutor to maintain, upon this argument, the legality of this power of amotion, because I submit to your lordships, that if the power of amotion is illegal, the grant is vitiated; if the king could not, by law, annex to the estate the condition which, in fact he has annexed to it, the grant is void, because he is deceived in his grant. The court is bound to say, the king would not have granted but upon the conditions he has reserved in his grant; and inasmuch as the condition cannot be complied with in point of law, the party shall take nothing under that grant; it is one of the prerogatives of the crown that it shall be so. If this reasoning be just (and I will cite some cases in support of it) then it will follow, that this power being illegal, the grant is void; consequently

Mr.

Mr. Amery has no title to the office of alderman, being elected under that void grant.

In *Shepherd's Abridgment*, tit. *prerog.* 48. it is said, that the king cannot, by force or fraud, directly or indirectly, give me the lands or goods of another man, or give him power to take mine from me *Noy.* 62.—21 *affize* 24. hence it is, that all his majesty's patents that are contrary to the law of the nation and common justice, are void.

In *Placito* 49. it is said, the king may not have or take that which he hath a right to, which is in the possession of another, but by a due course of law; for he has no prerogative but what the law allows him.

In the same book, page 94, it is said, that the king's grant may not be construed by a strained implication, beyond the express words thereof, nor to any other intent than what is precisely expressed, or necessarily implied in it.

In *plac.* 3. it is said, this is a rule, that his grant must be construed, *secundum intentionem et non in deceptione regis*; and that the king's meaning is the best direction for the construction of his grant; and therefore, where his patent cannot take effect, according to his apparent intent, but he will be deceived in it, it shall be void.

In *Bro. pat.* 11. wherever the king is deceived in his grant, or his patent, it is void; it is farther said, if the king's grant may not take effect according to his intention expressed in the letters patent, it shall be void, and shall not be extended to pass any other estate than what he intended to grant. I beg the attention of the court to this case, for it seems very applicable to the present question, with respect to the prerogative of the crown, in excepting out of a grant, that which would be incident to the nature of the estate granted. It is laid down in *Shepherd prerog.* 64. that he may except out of his grant, a thing incident to what is granted, which a subject cannot do. The same is laid down, 5 *Co.* 11.—1 *Co.* 50.—3 *Co.* 31. In *Shepherd prerog.* 91. it is said, where the king grants more than he hath, as when he hath the custody of land, and grants the land itself, the grant is void. That seems to me to be very applicable to the case before your lordships, with respect to that part of the argument which proceeds upon the idea that the corporation came to the crown by forfeiture. I will state some authorities upon that subject in this stage of the argument.

It is laid down in *Shepherd's Abridgment*, page 68, That no forfeiture can be taken, by the king, of any land, before the offender be attainted of the offence for which the forfeiture accrued; that the king is not, in those cases, to seize any man's land, till the cause of forfeiture, and the thing forfeited, be found by some record.

There are other authorities, which I have met with in the course of looking into this subject; and taking it either way, either that the power reserved in the charter of Charles is legal or illegal, I submit, that upon this replication the crown must have judgment. If the power is legal, the court, in the construction of it (if the cases I have cited are authorities in law) must look at the intention of the crown in the reservation contained in the grant; for I submit to your lordships, upon the authorities I have cited, that the power is what the king intended it should be: there is no limitation or restraint laid upon the exercise of this power; but it is said, the king, by order in council, may remove any one or more of the aldermen and common-council, that they shall be *ipso facto* removed, any thing contained in the letters-patent to the contrary notwithstanding. The clause which is supposed to narrow this power of removal, follows after those emphatic and strong words, "any thing contained in the letters-patent to the contrary notwithstanding." The king might remove one or more; there is no limitation; if he could remove more than one, I contend that he might remove all. The exercise of the power of the crown, taking into consideration the time at which it was exercised, I contend to be clear proof of the intention of the crown to reserve such a power in the grant; and the immediate submission of the parties to the exercise of the power by the crown, puts their construction also upon that power so reserved in the charter; for I cannot conceive

conceive that the persons amoved by this order in council would, in four years after the granting the charter, have submitted to an actual ouster of every one of them, unless they had been fully apprized what was the intention of the king in the reservation, and what was the true construction of that power so reserved. We are putting a construction upon it at this day, a century from the time when the fact happened; but those at that time put their own construction upon the power contained in the charter, within a period of three or four years after the charter was granted. Out of their mouths we have then the clearest evidence what the construction of this power reserved was, what the king meant and intended by it; and therefore, what he did, in fact, reserve by it. In point of fact, however, they are *ipso facto* amoved; and so it is averred upon this record; and it is no where stated upon the record, that they have resumed their offices, or were restored to them. When the court see upon this record, an *actual amoval* of all the aldermen in whom the right of electing aldermen is vested, and when the court see also a charter of restoration, and that charter is admitted to be fully accepted, the court must presume that they acted according to the charter of James II. and not according to the charter of Charles II. and (except the seven persons excepted) they must be the same body. According to the power contained in this charter, it was competent for the king to amove all the persons stated upon the record. He has done it; and the power of election consequently ceased. If by law that clause was void in itself, I submit the whole charter is void also.

All the authorities cited by my friends who have gone before me, and by myself, clearly prove, that where the king's grant cannot take effect according to the expressions contained in the grant, the consequence is, the grant becomes void. It is for the learned gentlemen on the other side, to shew any case of a prerogative grant, where an illegal clause was contained in that grant, that the clause has been illegal, and yet the remainder of the grant has been held good. I defy the gentlemen to shew such a case; I will venture to assert, none such does exist.

If however the court should entertain any doubt upon this first replication (which I do conceive impossible) there can be question upon the second.

The other ground upon which the motion was made for judgment for the defendant, is this; "That it appears upon the whole record (for to this purpose the defendant's counsel call in aid the *whole* of the record) that at the time of granting the charter of Charles II. there was a judgment *quousque*, suspending the functions of the corporation; that during this suspension, the king might grant: that he did so, and therefore the charter of James did not operate."

In answer to this objection I would submit, first, that nothing appears upon the face of the record which shews even that the functions of the corporation were suspended, either in fact or in law.

Secondly, that even supposing the corporation was suspended, the king could not grant so as to defeat the operation of the restoring charter of James II.

It appears by the second replication upon which I am now addressing your lordships, that the old corporation was a subsisting body, invested with the local government of the city of Chester, under the two charters of Henry VII. and Elizabeth. Now I should be glad to ask the gentlemen on the other side, what is there upon any part of this record which shews that the powers given by these charters of Henry and Elizabeth were suspended, much less that they were repealed? And a suspension, I most confidently submit your lordships, will not do for the gentlemen in this case; for unless they can shew that all politic and corporate capacity under this charter of Henry VII. was annihilated by what was done, it was incompetent for the king to grant, because the king cannot create two corporations with co-ordinate and co-extensive powers, to exist in the same place at one and the same time. This is said to be brought about by a judgment of seizure *quousque* into the king's hands.

It is material to attend to this form of proceeding:—it is not a *writ of quo warranto*, but merely an *information in the nature of a quo warranto*; the process and judgment

judgment in each of those proceedings are distinct and different. In an information, I take it to be clear, that no judgment whatever can be given against a defendant, unless he appears; I find it so said in 10 *Mod.* 250, by Eyre justice:—"In informations and indictments no judgment can be given, unless the party appears; process of outlawry indeed lies; but that is for his contempt in not appearing." Judgment of outlawry I take to be process to bring the party into court, but a corporation cannot be outlawed. There is no way therefore to compel a corporation to appear to an information, but by a *disfringas*. All the goods and chattels which belong to them as a corporation, may be taken for their contempt. You may beggar the corporation, but you cannot make them forfeit their *being* by an information in the nature of a quo warranto. This I take to be laid down in *Bro. corporation*, plac. 11, 21 *Edw.* 4. plac. 70. and *Skin.* 85.

A writ of quo warranto is called the king's writ; it is an original writ: the process is the same as upon all original writs by summons, and upon the return of the summons, if the defendant does not appear, there is a judgment of *capias in manus*, and upon that a *grand cape* issues to compel appearance. Now what was the consequence of a judgment of *capias in manus*, and an actual *grand cape* issuing? Upon that subject I shall beg leave to cite to your lordships *Bracton* 371 and 372. He there lays it down, that a *grand cape* issues to compel appearance; the land is taken, as it is said, into the king's hands; it was not followed, says he, by any severe penalty—he might appear and replevy within 15 days (not after the *issuing* of the writ) but after the actual *taking* of the land. The effect of the caption itself was not to deprive the tenant of the use and occupation of his land; for, says he, it would in that case be rather a disseisin than a distress; and therefore, says he, if a presentation should become vacant in the mean time, the tenant might present, and not the king.

And upon a final judgment, the sheriff's shall be answerable for the profits, from the time of the default, till judgment to the demandant, *Stamford Prerog.* 84. Yet by some it is said (*Keilway* 117.) *cape in manum nostram*, are but words of form. Land taken then under this writ of *grand cape*, issuing upon a judgment of *capias in manus*, was clearly replevyable within a certain time, if the party came in and replevied. But what was the consequence if he did not come in and replevy? Did he lose his land? He lost, in the language in which it is laid down in the books, the *seisin* of the land; that is, he lost the possession of the land, but he did not lose his *right* to the land. He was capable at any time of suing, and might recover the possession of the land again by a writ of right. When two actions were contained in the writ, the one in *rem*, the other in *personam*, *Bracton* thought that process real—by caption was the proper process; but he says, that others hold a contrary opinion. But he goes on to say, that even in a writ of *quo warranto*, nothing can be recovered; it is merely as I said before, like a bill of discovery; it calls the party into court, but nothing can be had upon the proceeding but discovery:—a writ of *quo warranto* issues against a party in possession of something which the king claims; the king brings his writ of *quo warranto*, calling upon the party to shew his title; he must shew his title; if he shews a grant, the king may proceed by *scire facias* to repeal it, but he cannot repeal the grant in a *quo warranto*, much less can he do it in an *information in quo warranto*.

Therefore I submit to your lordships, that the information in quo warranto in this case, must be considered as grounded on some analogy to those mixed actions where the object is both in *rem* and in *personam*; and therefore, according to *Bracton*, it is, that this process issues, namely, a *capias in manus*: if it were otherwise, the process and judgment would be altogether erroneous:—The writ of seizure must therefore be sued out upon the *quousque* judgment; for I contend, that the *quousque* judgment (which is the only thing stated upon this record) of itself does nothing, and the corporation, in fact, were never out of possession.

Before I discuss this question, I would cite to your lordships a few cases, to shew the difference between the process and judgment, and the effect of a judgment in
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an information, and in a writ of *quo warranto*; and your lordships will find the difference laid down between the writ of *quo warranto*, and an information in *quo warranto*, 1 *Sid.* 86. 1 *Salk.* 374. 1 *Lord Ray.* 476. Now upon the present record, no writ of seizure is stated: I submit, therefore, to your lordships, that the crown never had, in fact, the possession of the franchise, because the king could not have it but upon a writ of seizure. But if a writ of seizure had actually issued, it was incumbent upon the defendants counsel to have stated it upon the record, if they meant to contend before your lordships, that these franchises were upon a *quousque* judgment seized into the hands of the crown: therefore they should have stated upon the record, that there was a *quousque* judgment, and also a writ of seizure, which warranted a final judgment.

One of your lordship's asked, whether writs of seizure did ever issue upon *quousque* judgments? I have some cases to shew your lordships that they did.

In the case of the *king v. the burgesses of St. Ives*, there was a writ of seizure upon a *quousque* judgment. In the *king v. Langbour*, in the *king v. Thacksted*, and in the *king v. the burgesses of Calne*, there were writs of seizure, and judgments of seizure upon default of appearance.

In the case of *York*, which has been mentioned, there was an information—a judgment *quousque* upon that information—a writ of seizure upon that *quousque* judgment; and after that writ of seizure issued, there was a charter procured by the then lord chief justice of this court, lord Jefferies, who went down to York for the purpose of procuring the surrender of the old charter—who got a new charter after this seizure issued, and which was accepted by all the inhabitants of York; for it appears, that five thousand of them went to meet this famous charter upon the road, and brought it into the city with all the triumph they could.

What was the consequence of all this? In two years after, a writ of restitution of those liberties, which had actually been taken by this writ of seizure, was granted, directing the sheriffs to restore to the mayor and citizens of York, what had been taken from them under the seizure. Then I may say of it as the learned chief baron said of this charter of Charles—"The charter, and the interlopers under it, vanished together:" and they at York enjoyed, and they act under their old constitution to this day.

I know I shall hear a good deal from my learned friend, Mr. Bower, who seemed much to exult upon the subject of this seizure. To what times will he refer for the judgments of seizure? He will refer to times the most arbitrary and tyrannical that this country ever knew; I mean the times of Richard II. and Edward II. It is from those times my friend will bring his writs of seizure: but I ask him to shew me one instance of a writ of seizure having passed out of the crown office since the era of the revolution. I defy him to shew me any instance of a writ of seizure to take the franchises of corporations, since an era, when the liberties of Englishmen were settled upon a foundation, which I trust nothing can ever shake.

But it was said by my learned friend, Mr. Bower, that a writ of restitution was necessary in this case. Good God! can such be the reasoning of a gentleman so able as Mr. Bower? Is a writ of restitution necessary to direct the sheriff to restore what he had never taken? The writ of seizure is not stated upon this record: and again I say, by the law of the land, the court cannot intend any thing which is not stated upon this record, to overturn a verdict;—no writ of seizure issued upon the *quousque* judgment: the argument must therefore be confined to that *quousque* judgment *itself*, as it stands upon this record.

What is this *quousque* judgment? It is an inchoate, incomplete thing: it is therefore a nullity; it has no force or effect as a judgment: and the case cited by Mr. Erskine from 1 *Lord Raym.* 17, goes all the length of that proposition. Why are the corporation to have notice of this judgment? Can they have notice of it but by the execution of the writ of seizure? which, like the *grand case* upon a judgment of *capias in manus*, gave the tenant notice, by the actual service of the process upon his land, that there was some suit in the king's courts which had warranted that proceeding;

proceeding; and that therefore it behoved him to come and make his appearance to answer to that suit. But in this case, a *quousque* judgment, followed up by no seizure, gives the party no notice of the suit; it is an inchoate, an incomplete judgment: no writ of error lies; no writ of error could be brought by the corporation of Chester to reverse this judgment; even a final judgment, of the nature of this *quousque* judgment, I do submit to your lordships, would have had no effect whatever: and I submit it upon the authority of a great many cases, which I will merely refer to, without entering into the argument at large: *Malmesbury* case, which has been cited; *Shew. 276*; *Riley's Plac. Parliament. 168*; (if I should state any that have been mentioned before, it will be through inadvertence;) *Skin. 293* and *310*; *Jenk. 141*; *Br. Judgment, 44*; *1 Lev. 105*; *Lutw. 860*.

These authorities, I contend, go the length of shewing, that even a final judgment would not have the effect of doing what it is necessary should be done upon this record, in order to make the charter of Charles a valid charter; and therefore I contend before your lordships, that the judgment of seizure *quousque*, such as is stated upon this record, is erroneous, irregular, and ineffectual; that the corporate capacity of the mayor and citizens of Chester was not even suspended by it, much less that it was dissolved and extinguished, which I say it is necessary and incumbent upon the gentlemen on the other side to make out, before the charter of Charles II. can have operation.

I submit also to your lordships, that there is no defect in either of these replications; but that supposing both the replications were bad, still the court are to look upon the whole record in this case; because the king is not bound to make a title in himself to the franchise, but only to put upon record that which shews the defendant has no title to the franchise.

In the next place I submit, that it is impossible for any man to say, that these two issues which are found for the crown, are not material issues upon the record; and therefore that there must be judgment for the crown.

Mr. Wood. There is one case I beg to refer your lordships to, upon the point of the pleadings; the case of *Lord Portchester v. Petrie*, which was decided in Trinity term, 1783. That was an *audita querela*, brought by lord Portchester against Mr. Petrie, claiming to be indemnified against a judgment which Petrie had obtained against him for a considerable sum for bribery at the Cricklade election; and in that *audita querela* he stated, as a ground for his being indemnified, that he had discovered an offender to a Mr. Richard, one Hinton; and Hinton, upon that discovery, had been prosecuted to conviction. There is a clause in the bribery acts which indemnifies a person who shall discover any other offender, and bring him to justice.

There was a plea; and upon that plea it was stated, that Hinton, who was so brought to conviction, was a person that had been indemnified; because he (Hinton) had brought an action against one Hopkins, and had prosecuted Hopkins to conviction; and that therefore the bringing an indemnified person to conviction, could not intitle lord Portchester to the benefit of that statute: and in that plea there was this allegation, "And the said Samuel Petrie avers, that the said judgment, so given in the said court of our lord the king, before the king himself, against Hopkins, was in fact given before judgment was given in the said court against the said William Hinton, in the action so commenced against him by George Richards." This was an averment of the priority in these two judgments, that Hinton was completely indemnified by having obtained judgment; for it appears by the record, that they were both of the first day of the term; so by the record it appears, that both judgments were of one and the same time; but there was an allegation in this plea, that in point of fact there was a priority in the judgment Hinton had obtained. The replication then stated, that in fact the other judgment was prior, with a traverse, whether the judgment obtained by Hinton was first or not? and upon that an issue was taken, and instead of joining the *similiter*, they demurred; and the matter assigned in the case of demurrer was, that it appeared, by the proceedings on the record, that both the judgments were given at one and the same time, that is to say,

on the same Tuesday next after the morrow of All Souls; and therefore the said averment in the said plea contained, that the said judgment, so given by the said court against the said Robert Hopkins, was given before the said judgment against the said William Hinton, is wholly inadmissible, and ought not to have been offered; or if the same be admissible, it being matter of record, ought to have been verified by the record of the said judgment. This matter came on to be argued, and the court were of opinion, that that allegation in the plea was totally inadmissible; that it could not be received. A great many cases were cited, and an elaborate judgment given by this court, that you could not be permitted to aver a matter of fact against a matter of record. So far the court decided against Petrie; but the court said, though that allegation was inadmissible, that looking at the *whole* allegation and the plea, sufficient appeared to shew that lord Portchester was not entitled to the indemnity; and therefore, though they rejected that which made a distinct substantive allegation in the plea, yet as enough appeared upon the whole of the record, they gave judgment against lord Portchester. That I look upon to be a material case in point.

Mr. B E A R C R O F T.

I Am to trouble the court in support of the title of Mr. Thomas Amery to the franchise of being an alderman of Chester; and likewise his claim to the judgment of the court in favour of that title.

I am very ready to confess, that in the discussion of this record rise will be given to some new, important, and perhaps curious questions; but I am perfectly satisfied that there is no cause to give any of those questions the epithet which has so freely been bestowed upon them, or that they are so alarming as the gentlemen represent.

One learned gentleman, from the tenderness of his feelings (I take it for granted) for the metropolis of that province which gave him birth, trembles for the fate of the city of York.

Another gentleman, whose patriotism is more extensive and universal, has raised from the dead the ghost of lord chief-justice Saunders, in order to terrify your lordships. These are arguments that will have no manner of effect: I have done with them; and I shall use none such.

Your lordships will look at this record with legal eyes, and you will see those facts upon *this* record, which the law permits you to see, according to the rules of law; and upon those facts, so seen, the court will do what is its duty, pronounce the law that arises upon those facts, utterly regardless of the consequences—*fiat justitia, ruat cælum*.

I agree perfectly with Mr. Topping, that the burthen of title lies upon the defendant in this proceeding; he is the actor, he is the first speaker; and he is to give an answer to this question, which the crown by its prerogative may put to any body, namely, By what authority do you claim this royal franchise?

I agree, that in such a proceeding, the defendant, in his plea, is to set forth a complete legal title to the franchise; there must be no substantial defect in the title; if it be defectively and erroneously set forth (in order to answer the purpose of justice) the court has, upon various occasions, given an opportunity to amend.

I contend, and I think it cannot well be disputed, that the title which the defendant has set forth by his plea (take it upon the face of the plea) is perfectly good and right; for he states a grant by a charter of Charles II. of the franchise of a corporation to certain persons inhabiting that place, which goes by the name of the city of Chester; he gives them various powers; he constitutes aldermen, among other officers; he gives the mode of election of those aldermen: and my client, the defendant, goes on to state himself duly elected according to the mode of election prescribed; he says, he was elected, admitted, and sworn, according to that charter.

I will take notice, for the purpose of dismissing those issues, which those who make a free use, or rather abuse, of the prerogative of the crown, perpetually take, and have

have been taken upon this occasion ; I mean simply upon the election, admission, and swearing, they are found to be as stated ; they are at an end, therefore ; and the question is substantially,

In the first place, upon the plea and this charter, has he a good title ?

I shall just state the substance of the record farther, in order that I may be better understood in the several observations I shall lay before the court. If they can succeed, on the part of the prosecution, to shew, that this title, stated by the plea, is bad, it will do for them ; if they cannot do that, they must take another course, which course they have taken in the pleading, that is to say, the king may reply double if he pleases, and introduce any other facts, which are true, for the purpose of avoiding that title that is properly set forth upon the face of the plea.

But I contend before your lordships, and it will be very important in my apprehension, if I am right, that notwithstanding it is permissible to the crown to reply several matters, yet the court in giving judgment, is only to follow the course of pleading to the several matters, each of them separately and distinctly by itself. Your lordships are to consider, that there is a partition between the one and the other, and you are not to peep over a wall to borrow any fact that is to be found in the course of one pleading, to apply it to the other : in plainer English, still the reason of this, in my apprehension, is apparent—pleading is reasoning and arguing.

The defendant says in his plea, “ *This is my title ;* ” the prosecutor says “ *Aye,* but there is such a fact (which he introduces) that will avoid your title in your plea : ” then they go on in a course of pleading between the crown and the defendant, as upon that replication.—I say, therefore, that whatever is admitted in the course of the defendant’s rejoining, and so on through the whole line of pleading to that first replication, must not be made use of at all, though it appears admitted upon the record to give effect to any other part of the pleading ; that is to say, while parties are going on in one line of argument, nothing is more common—(and such is the course of pleading)—than to admit certain facts which are not true, just as in common course you say, “ I admit it for the sake of argument, ” and so go on in pleading and arguing. It seems to me that is the plain common sense of the thing, otherwise it would be dreadful ; the prerogative of the crown to reply several matters would be abused ; an infinite quantity of matter would be replied severally, which would distress the defendant beyond measure, for in the course of answering the pleadings upon one, he would be driven to say something to affect the other.

I submit, therefore, to the court, that wherever a fact appears upon this record in one line of pleading, it is not to be used out of that line, and brought to bear upon another ; I take that to be the general rule ; and of all the cases that have been quoted, no one has been applied to shew the contrary.

Thus it stands : —The first answer given to our title (for so it is, though it is a replication) is this ; “ Besides what you, the defendant, have disclosed to the court, of this charter upon which your title stands, there is another circumstance which you have not disclosed, and on the part of the crown we now introduce that which is to destroy that title, for in that very charter there is a clause which impowers the crown to remove the officers, the aldermen, and the common-council ; that power was exercised, in fact, a long while before your election ; your election must have been void therefore ; for all those persons, who according to that charter upon which you put your title, could have made an election, were removed, and did not exist ; that is to say, there were no aldermen or common-councilmen left ; *argue* you can have no title to be an alderman under that election. ”

That there is such a clause in this charter is admitted, but there was a dispute in point of fact, and an issue was taken upon it, whether the order of removal was duly signified. That issue is found against us, therefore I must now take it just as the same thing ; and I am to consider that *one* answer to the defendant’s title is, “ You cannot be chosen under that charter, because the persons who by that charter were capable of choosing you, were themselves removed by a power reserved in that charter. ” —That is one answer.

Now I go to the answer upon the second replication—and it appears to me that the first principles of justice and common sense require that they shall not be confounded together; for in the second replication, which I call the second answer to the plea, it is taken up in another mode, and the crown says, “ Well, be it so, as you state upon your plea; that there was such a charter, such a right of election; you was elected, sworn, and so forth, yet there was a charter of Henry VII. confirmed by a charter of Elizabeth; there was a proceeding in quo warranto, with a judgment quousque—there was a charter of restoration and pardon; if they forfeited any thing by that judgment, they recovered it, consequently there was an end of the charter of Charles II. which was *intervening*, say the counsel—says a judge of great authority, *interloping*. Words will not alter the nature of things; that was really the case upon this subject.

It will be my business to consider whether the title we have set forth upon our original plea is not good, for the counsel who have spoken upon behalf of the crown, have differed in their manner of arguing that matter; some have contended that the whole charter of Charles II. (on which undoubtedly our title must be founded) is absolutely void, on account of the illegality of that reservation; others make another choice, and say “ No, it is perfectly legal, but it has been used in fact, to put an end to the corporation.”

Now as to the first objection, that because of this power reserved, therefore the charter is totally void; in my apprehension, it has been argued upon an absolute mistake. It has been argued (and several cases have been cited) that this is illegal; the king has therefore been deceived in attempting to do something that he cannot do by law, and therefore the whole of the patent falls to the ground.

There has not been any case quoted and stated which goes the length of that; and I will beg leave in the outset to state what I take to be the law upon that subject.

Your lordships will find this doctrine in a great number of cases, from very early times, down to Lord Coke, and never disputed since, 8 Henry VII. folio 8. *Dyer* 197, and 352. 11 *Rep.* 2. *Curle's* case—that there is a difference to be observed in all cases where the king is said to be deceived in his grant. It has been argued all along, that the king was deceived in his grant; that phrase is explained in those cases thus:—If the matter which is false in the letters patent be suggested on the part of the grantee, and that to the prejudice of the king, there the king shall be said to be deceived in his grant so as to make it void; and it was so adjudged in the king v. *Kemp*, which has already been quoted by the gentlemen, 12 *Mod.* 78. but where the words of the grant are the words of the king, for his own sake, although the king by his inference appears to be mistaken even in his law, yet the king shall not be deceived so as to avoid his grant.

The difference seems to be sensible and reasonable:—If the party who takes by the king's grant, has himself deceived the king by any suggestion, it is very fit he should gain nothing by that grant; but if there is something reserved in the grant for the sake of the crown, that does not give any thing to the grantee, and is mistaken, yet nevertheless the king shall not be considered as deceived in his grant, though that part shall not operate, yet the rest shall.

If this doctrine is established, the ground of the cases which the gentlemen have stated, does not apply to the present, because if your lordships will be so good as to look to the power reserved here, it is merely for the sake of the crown that it is reserved; it is not at all for the sake of the grantee, for it is, that notwithstanding that which has been granted, the king shall have a power, if he pleases, of recalling it; it is therefore a grant during pleasure. Now how it can be said, consistently with common-sense, or according to the principles of the law I have last laid down, that the king is deceived in this grant, I cannot conceive. It seems to me, that if the king is deceived in his grant, their cases certainly do not apply to set this aside; or if they did apply, it would be begging the question, as to the legality of it; though if it is illegal, it would answer our purpose very well, because then the
exercise

exercise of this illegal power would not have put away the aldermen and common-council ; they might have remained to elect.

The gentlemen there find themselves in a dilemma ; but I will take the case as I really think it is in point of law : I will contend, that the power reserved by the crown in that charter, is legal ; but that the attempt to exercise it, in the mode in which it was exercised by this order of removal, is not according to the power, or the intention of the power, and therefore was a nullity and void.

What is the charter ? It is a grant of a corporation for public purposes, beneficial to the realm. The regal power to grant such franchises, like all the prerogatives of the crown, is for the public benefit ; what is the sort of public benefit ? Why it is, that the peace may be preserved there ; that there may be government, order, and magistrates. I contend, that the constitution of this country is not in the least danger by the king's having a power to name a magistrate to-day and remove him to-morrow ; it is, I believe, the case of all the great and small magistrates in this country, except the twelve judges of the realm ; for the most part, undoubtedly, it is so.

Your lordships know very well, that justices of the peace, by their commission, may be removed at any time ; they are perfectly at the will and pleasure of the crown. I trust that the administration of justice, and all the powers of justices of the peace, in every part of the land, is as material to the general constitution of the country, as any particular town, city, or borough. It seems to me, therefore, that there is no reason in law ; there is no ground for an apprehension that the constitution will be in danger, by supposing that the king has the same power over his commissions of government, if I may so call them, and his commissions of the peace, in any one spot of the realm as in another.

Why then shall not the king grant to be a corporation for a term ? It has not been usual to do so, but it does not follow that it may not be done. Why may not the king do it during pleasure ? It is not usual for the king so to grant, but there is no principle or reason to shew why it may not be done. What is there then in this clause of the reservation of the power in the original charter, that should have the effect to annihilate it ? Here is a grant for a corporation, with a great number of franchises and powers, with many officers, of which the king says, " I will make a bargain at the time, to have power to turn out one or more at my will and pleasure."

This part of the case is attacked by an argument, and a piece of law ; which law does not, in my apprehension, apply to the case. Many cases have been quoted, and much time consumed, in stating them at length, to prove what I do not deny ; that is to say, that when a man, by the grant of the crown, is in the complete possession of a franchise, without annexing any terms, provisos, or conditions, he cannot, by the power of the crown, be turned out of the possession of that franchise, but there must be a proceeding by law to turn him out, for some abuse of a trust, which is inherent in every franchise of the kind ; but I say, that is not this case. for the king gives it upon a condition that he shall be at liberty to recall it personally, as to the individuals, when he pleases, upon certain occasions.

It seems to me, therefore, that the general law, that you shall not be turned out of your franchise but by the judgment of a court of law, does not apply to this, because it is given *upon these terms*, that it may be recalled if the king pleases, by a certain way. And when an observation is made, that this is to be done by an act of the crown and the privy council, and that we are to be governed by the privy council, such an observation is puerile. The king can, on many occasions, act in his privy council ; this seems to be inherent ; it is a term in the very grant itself ; it is accepted upon that condition, and it would be to deceive the king in his grant, and to deceive him by a course of law, to tell the crown, " Oh ! the grantee takes ; but that part is void in which you have made it a condition to resume." The contrary is the principle, undoubtedly, of construing the king's grants ; that they must be construed in favour of the crown. It seems to me, therefore, that there is no

colour

colour to say, this is, upon the face of it, illegal; but, say they, "if it be legal, the effect of it is, that in the use which has been made of it, there was an end of those who were to elect aldermen." I am obliged, by the finding of the jury, to take it that such an order, as is stated, issued and was duly signified to the several parties, and that they were all the existing parties in the corporation.

But I say, that sort of power was not reserved by the crown. The words of the reservation, so far as it applies to the present case are, that the king may remove *any one or more* of the officers named; the power reserved is certainly not to remove *all* of them, and therefore, though in the course of the argument, the gentlemen very glibly introduced those words, "*or all of them*," those words will not be found in this power; and the largest words that are in the power are, "*any one or more of the aldermen*." Now what is the fair construction of these words? that he may remove *one* if he thinks proper; that he may remove *another* if he thinks proper; but do these words themselves import an idea that the king reserves to himself a power of destroying the corporation? or to do any thing that *tends* to destroy the corporation? all constructions, upon all occasions, are to be made, I believe, against the king as against a private person. Will your lordships, by a forced and strained construction, suppose, that the king (even going no farther than those words) reserved to himself a power of annihilating his own grant? but I say, your lordships must read the king's grant, as you do every other person's, from the beginning to the end, and take all of it, in order to understand the meaning of any part.

I say, that in a *grant*, or *letters patent*, as well as *wills*, all parts must be looked at, and they will throw light upon the meaning of one another; if, therefore, your lordships could suppose, upon these words "*removing any one or more*," that he had a right to remove them all at a sweep, and so put an end to the whole corporation, your lordships have nothing to do but to look to the next clause, which is totally repugnant to any such idea; but it says, that in every such case other fit person or persons, within a convenient time after such amotion or amotions, shall be chosen, sworn, or appointed, in such manner as the letters patent had before directed.

It seems to me, therefore, that there is no colour to say, that he meant to reserve a power of removing them altogether, in which case there cannot be an election; but he reserves only such power as is consistent with the filling up the places of the persons removed, by election; for your lordships are to make the king's grant intelligible, if you can, and in no other way can this clause, which immediately follows the other, be so considered, or be attended with any effect.

My friend seemed to triumph exceedingly with this sort of argument; he might remove *one* or more; if so he might remove *two* or more; he might remove *three* or more, and so on, just as if we were talking at *nisi prius*, with all that sort of argument we are so much used to, *where will you draw the line?* It is not incumbent upon me to draw the line, though it might not be difficult to do it; for various are the cases which must have occurred to your lordships, in which, though it may be difficult to draw the line exactly, yet where you may say, with the utmost satisfaction to your own minds, "*this is far beyond the line*"—I would draw the line *there*—leave *some* aldermen and common-council in order that there may be an election. The meaning is, to remove them, and that when they are removed others shall be elected in their stead; it could not be the meaning, therefore, that it should be such a removal as absolutely prevents the power of any future election.

I trust, therefore, I have established the legality of this charter, and rescued it from any objections that are to go to annihilate it upon the ground of the reservation of this power.

The next question is, whether by any thing upon the first replication it is avoided.

I say, the order of amoval, as found by the jury, was not the power reserved; that the effect of it was therefore a nullity, and wholly void; then the replication is not an answer to the plea, and can be attended with no effect.

I shall

I shall venture, notwithstanding the line of my education has not given me much experience in the forms of pleading, to take notice of another part of the case, which is upon the language of the plea, "that in every such case other fit person or persons, within a convenient time after such amotion, shall be chosen, sworn, and appointed, in such a manner as by the said letters patent was directed, into the office of any such person, &c."

The question is, whether that mode of election is substantially set forth. Now when I consider that question, I shall take it for granted, that the court does not mean to encourage perpetual repetition, and the amplification of pleading; on the contrary I have observed, with great satisfaction, I am sure to my own mind, that the court has of late years, by degrees, very much discouraged it; they will allow, therefore, any reference back, but still it is with a view to preserve the great principles of pleading *certainly* and *substance*, that a plain man and a good lawyer should not be led to doubt, for that is what I conceive to be meant by the substance and certainty required in the form of pleading, that men should, in short, speak plain upon legal subjects to lawyers.

Then the answer is, *here* there is such a reference; for this reference, "in the same manner as in the letters patent was before mentioned," is a reference to the plea; that is a reference to the letters patent; to what? to the *whole* letters patent which are not upon this record; "in such manner as by the said letters patent was before directed;" before what? before this clause which they have introduced; there is not the least tittle of direction or reference to the plea, if it had added to this reference, "in such a manner as by the said letters patent was before directed, and as in the plea set forth," or something of that sort. But I say, here is no reference to that, but to something or other that is to be found in the letters patent, if you will be so good as to look at them; but here they *are not* for your lordships to look at them. I conceive this is a substantial defect.

The learned gentleman, who thought he had given an answer to this objection, did not, however, chuse to rest satisfied with that answer, but he said, "if this allegation is not correctly and substantially set forth, it was not necessary to be there at all."

It is a fair argument for us in the general to say, that what you yourselves have introduced into your replication, shall be taken to be material; it is one link of the chain of the answer you have given to our plea. What is the substance of the answer? The power of amotion, and an amoval accordingly. Shall it be permitted to them to say, that this, which is the foundation of my argument (and I trust a solid foundation) to shew that power of amotion to be illegal, is utterly immaterial?

I take it that it is necessary (notwithstanding that abridgment which the court not only allows, but encourages in the forms of pleading) that you must set forth the necessary parts of a deed. What are the necessary parts? Why those parts that are necessary for the construction of what is set forth: I contend, therefore, that the clause, "That in every such case other fit person or persons shall, within a convenient time, be chosen;" and the mode of election is a material part to lay before the court, and that it should carry a precise and plain idea to those who want to understand it.

Now what is the court to understand?—It is that all this removal may be, *so that nevertheless other fit persons within a convenient time shall be chosen*. How? Why in the manner as by the letters patent was before directed. Is it not necessary to set forth with legal certainty what is the mode of that election? This is the way in which I bring to bear the materiality of this objection.

I submit to your lordships, therefore, that it was incumbent upon them to set that forth, and their argument—"If *we* have omitted it, *you* might have set it forth," admits the materiality, and they must set it forth by legal and plain language. If, therefore, we are right, that it is not a defect in form merely, for that won't do, but a substantial defect for want of a plain reference to that which is in the plea

plea before. I conceive that I have made out the proposition, that this is a substantial part of the declaration, that they fail in the manner of setting it forth, and consequently that the whole replication is void. Whether that is the consequence *universally*, I shall have occasion to consider upon the second replication; but upon the present replication, it is perfectly clear it avoids the whole, for without that they cannot put the two parts together, which are necessary to avoid our plea; that is to say, the power of motion, and the motion according to that power. I quit then what I have taken the liberty to call, and I trust not improperly, this *first line of pleading or argument*, between the crown and the defendant.

I now go to another, which I conceive to be independent, and that is introduced by the second replication:—here they take it up upon another ground, and they say, “Well, notwithstanding all this charter of Charles II. the power of election, and all the rest that is stated in the plea, still it will not do, for there was an old corporation in this place, by virtue of a charter of Henry VII. confirmed by that of queen Elizabeth. It is true there was a proceeding in quo warranto, and a judgment quousque against that corporation. It is true your charter of Charles II. intervened in that situation, but they were all removed! and moreover, there was a charter of James II. of restoration and pardon.”

“I should be glad,” says Mr. Topping, fastening upon Mr. Bower (thank God I escaped) “If any gentleman will tell me what connection this order in the second replication has with the charter of Henry VII. or the charter of restoration;” and in his anger he says, “Any other matter might just as well have been stated.” Now if he should be glad *any* gentlemen would answer that question, I beg he will apply to his friend, Mr. Wood, who sits next him, who drew the replication, because *he* is the gentleman to tell him what connection it had; depend upon it, he thought it had some connection, or he would not have introduced it into the pleadings.

I am not making this observation merely for the purpose of exciting a smile; but I say Mr. Wood did feel there was a connection; he introduced it, because he felt that without that fact he could not give an answer to our plea.

I am afraid that in order to be understood I must state the second replication: it is, that the original charter of incorporation by Henry VII. was accepted; that it was confirmed, with some little additions, which are immaterial; that then, in 1683, the information in quo warranto was filed against the whole corporation; and that in Hilary term, the 35th and 36th of Charles II. by default, the judgment *quousque* was signed.

If Mr. Wood thought that the charter of restoration alone would have done, why did he not stand upon that? But he felt that would not do; he felt the charter of Charles II. intervened in point of time; he felt that in point of substance it stood in the way of the exercise of the power by James II. he wished it out of the way, and therefore he proceeded to do it by the exercise of that power reserved in the charter. Now I, in my turn, call upon any gentleman to read that, and tell me, whether that was not the feeling of the pleader when he drew this replication? But he has not done it effectually; for it states, that notwithstanding the proceedings in the information in the nature of quo warranto, king James II. by the said order last mentioned, was pleased to order, according to the power to him reserved, &c.

Here we are got to sea with a vengeance! We are not only not referred to the plea, not referred to a part of one single patent, but it is, “according to the power reserved in the late charters, patents, and grants!” I leave to pleaders to determine whether such language, in point of pleading, is to be endured? I say, that is the want of substance, that is the uncertainty which is aimed at in the conclusion of almost every demurrer for substance: but if that be so, the gentlemen then resort to their old cure, that is to say, that however awkwardly and unsubstantially this may be introduced upon the record, yet that it turns out to be superfluous, utterly irrelevant, in plain English, so much nonsense, and it will do no harm: I am sure it will do a great deal of good, if it should but teach pleaders, by example, that a great

great deal of nonsense will do harm; because otherwise, for certain reasons that now and then occur to those employed in drawing pleadings, it may be a little beneficial to them to introduce a sufficient quantity, whether it be nonsense or no.

This brings me to the main ground upon which I mean to support this case. I do not find myself, with the little time I have had to look into cases, strong enough to encounter those which speak of the great difficulty of dissolving a corporation once existing; there is a great difficulty, but I deny that any of their cases have gone the length to prove the impossibility of it, for that would be a great absurdity.

I will allow as much as is fair as to the immortality of the *soul* of this corporation, but I beg to say, that when the *body* is out of the way, it is competent to the crown to insert another body in its stead. This may appear fanciful, ideal, and metaphysical; it is so, and all reasoning upon these subjects must be so, for the subject matter is ideal, fanciful, and metaphysical. A corporation is a fanciful personification; and I will venture to say, that all the reasonings and discussions upon the subject, will be found of that sort, sometimes with a degree of gross ridicule in my apprehension, because I could point out to your lordships the very learned serjeant arguing that a corporation must be dissolved, because the mayor was gone, and exclaiming "Good God! could the body remain alive after the head was cut off?" I only mention this as an apology for any ridicule that might appear in that kind of arguing.

Then I agree there did exist a corporation by virtue of the charter of Henry VII. I am not reduced to the necessity (God forbid I should) to maintain that there may be two corporations in one and the same place; that is a gross absurdity; I might as well set about to maintain the proposition, that a cube of a foot square might be in a box, and another cube of the same size might be in the same box; it is impossible.

Mr. Wood. If the box is big enough it may.

Mr. Bearcroft. I suppose my friend has been used to *dice*, and has a brace of cubes in his head. I had in my idea a box of a foot square.

I admit there was an existing body by the charter of Henry VII. I admit it had a *local habitation, and a name*. I do admit, therefore, that while it was fairly in possession of that place to which it was appointed by the power of its creator, the crown, it was not in the power of the crown to send another to jostle it out of its place. But I submit to your lordships (and that is what I call the curious part of the cause; it certainly is so, and I believe it is new; every day new things do arise and call for judgment) that under the circumstance which happened in this case, at the time of the grant of the charter of Charles II. the old corporation are *out of the way*, and, to be more correct, *out of the place*; and if I maintain *that* proposition, I am supporting, in point of substance, the great ground upon which I mean to argue the defendant's title.

I do not enter now upon the question of dissolution, because if I can make out this proposition, that the old corporation was out of its place, then I think it is clearly competent for the crown to put another into its place.

This judgment *quousque*, and the effect of it upon this occasion, is seriously to be considered: all those cases, in my imagination, are thrown away, which are to prove that the effect of a judgment *quousque*, does not amount to a sentence of dissolution and annihilation. I am ready to concede to the analogy of the doctrine drawn from writs of right, the *grand cape*, and those sources from whence (unnecessarily in my apprehension) all those arguments have been drawn that there is not absolutely an annihilation; I would have been ready to concede that it is in the nature of a *disfringas*, to compel the corporation to appear; there is no other process; Mr. Topping has put it rightly; here is not a *real* person that can be outlawed, here is an *ideal* person; you must use such force as a fancied person is capable of feeling; you must distrain its property; I say, that by the effect of the judgment itself, and what must of necessity be taken by your lordships, as judges and lawyers, to be the immediate consequence, without any intendment of fact

(which I agree is not to be done upon indictments and informations) your lordships will see that the effect of this judgment *quousque* was to put the old corporation out of the way; that it was in *custodia legis*. If it be in the nature of a *distingas*, which I agree it is, then it is in the custody of the law; it is out of the persons who were possessed of it; they cannot answer the purposes for which it was granted to them; and it is competent to the crown to grant another, for the general purposes of government.

One of your lordships, early in the cause, asked a question, which I own struck me much, and I made some little inquiry about it—"Whether in fact, a writ of seizure appeared to have issued upon the present occasion?" It certainly is not stated upon the record; it is not stated on the proceedings as far as they go in the *quo warranto*; but I submit to your lordships, that comparing the language of that record with the language of those which have been handed up to your lordships, you will see that, in truth, the writ did issue; what those are that are now handed up, I cannot tell, except in answer to a question I put, whether they are upon the controlment roll: I am told they are, but there is no entry upon the great roll upon which the pleadings and final judgment are recorded.

I say there is no instance (and I call upon the gentlemen to shew me if there is) of any notice being taken of issuing the writ of seizure *quousque*; it certainly does not appear in any one of the cases, nay, what is much more for my purpose still, in the case of the city of York, where it appears that it must have issued, it is not taken notice of; I say it must have issued: and here I will put my friend at ease for his dear city of York. The difference between the city of York, and the city of Chester, is just this, which makes all the difference:—the city of York *appears*, and puts an end therefore to the *distingas*; they purged their contempt with their appearance; they were intitled to be restored to their rights, which I believe they afterwards were. The reason of my observing it is this, that though they appear, and I think they use the phrase *replevyn*, and pray that the king's hands may be removed and so forth; yet upon that record, your lordships do not see that the writ of seizure *quousque* ever issued.

Mr. Justice Grose. When did the city of York appear?

Mr. Wood. After the charter of James.

Mr. Bearcroft. Be it so; it is the same thing to my argument, because my argument goes to this, that by their appearance they stand *recti in curia* again: they are intitled to replevy; they do replevy; the replevin seems to be by the act of appearance, and they are restored by the act of appearance: but all I need contend for is, that there is a complete entry of an appearance, by which they get rid of the seizure, though upon the entry on the record no notice is taken of its having issued; which leads me to suspect, that frequently it does not issue, and perhaps is not necessary that it should. If all the property of a corporation are those ideal and incorporeal franchises, there is nothing to seize; if they had any land, money, plate, maces, perhaps they might be seized, and in that case perhaps it issues. I agree, indeed, to the rule laid down by Mr. Topping, that in informations and indictments the court shall intend no fact: but whether in point of fact a writ of seizure issues or not, your lordships are not to shut your eyes against the law; if therefore you see by the course of these records, that it is not the fashion to enter the issuing of the writ of seizure *quousque*, then I say it either issued as matter of law, or that it is not necessary; and that by virtue of the judgment, all those franchises were taken into the possession of the crown. If this be so, then I submit to your lordships the consequence fairly follows; for looking to the proceedings in *quo warranto* against Chester, which is introduced upon this record, how stands Chester? I do not say having completely forfeited its franchises, but having lost all right to the exercise of its franchises; they are out of them; they may redeem by appearance, if they please, but it does not appear upon this record, to this hour, that they have so appeared; they are in rebellion to the process of the court; they have not a right to exercise any one franchise; shall it be said then that when the crown has granted a corporation

ration to exercise the power of government, of magistracy, and to preserve the peace, if they think proper in a proceeding to be obstinate, and not to appear, the great purposes of the crown's prerogative shall not be answered?—If they willfully and obstinately desert the execution of a trust, it seems to me the king may grant that trust to others. I do not know that the king could stop short upon the ground of their not appearing in a suit of this kind, and issue a *scire facias*. I do not think *that* could be done; it is merely a distress, a process, for the purpose of compelling an appearance—*non constat*, though they do not appear to day, but they will appear to-morrow, and so on: and here they make use of the usual argument, “*Where shall the line be drawn?*” Because they do not appear in three weeks, three years, or six years, does it follow that the king shall absolutely annihilate them? “No!” say the gentlemen, “he cannot annihilate them by any proceeding at all;” then the consequence will be, that it will be in the power of any obstinate corporation, unless the law takes place, absolutely to prevent the king exercising the powers of his prerogative, for the purpose of government and magistracy. It seems to me *that* would be attended with great inconvenience and gross absurdity; then what I mean to say is this, the powers of this corporation are *suspended*; they could not do those things for the purpose for which they were created at that time; the place where the city of Chester is, was without an acting substantial corporation, which could answer its own purposes; the king therefore had a right to grant a charter, and he did hurt to nobody by granting a charter to new persons; and when I use that phrase, I am astonished at the gentlemen reiterating the idea, that the former direction to the jury was right (after the solemn determination of the court) that the charter was to the old corporation. It is not a grant to them by their corporate name, according to their then charter; it is certainly true that *they* cannot take by *that*, but it is clearly to *others*; it is upon an idea that that charter was out of the way. The charter is granted to those persons who have in that place the name of citizens and inhabitants, which is a mere description of them, excepting seven persons, and excepting one, who is called the late recorder; he was alive at that time, and he is called the *late* recorder, because he and all the others under that charter had no power to act at that time: upon that ground it was that Charles II. exercises the power inherent in the crown, to create a corporation in that place.

The question, then, comes to this: Whether when one king has exercised a power that is inherent in him, his successor can exercise another power, that is to do away what his predecessor had done? Whether it be Charles II. or James II. does not signify a farthing; it is the king who in the time of Charles II. has granted this charter; then if there is a subsisting corporation in the way, how could a subsequent king, James II. grant a charter restoring the other to their right? That could not be done but by a court of law, by a court of record. I say, that whenever the existence, or any thing relative to the rights, of a corporation, is once pending in a court of law, the act of the king is an absolute nullity, unless it be introduced into that court of law by the pleadings: I say, if that charter of restitution and pardon, as it is called, was to operate upon the occasion; if that was to do away (I do not say their forfeiture, but) their suspension, that ought to be pleaded by them, and then it would operate perhaps as a restitution; and, upon that occasion, a writ of restitution probably would have issued: but I say, this should be seen upon this record, which records that farther record. Here was a suit instituted in a court of competent jurisdiction, the effect of which was, to take away from the then possessors all their corporate rights, powers, and franchises; they might, it is true, have got them back again; they could not get them back again but by a legal proceeding upon this record: and here the language of that judgment is extremely important, for it constantly expresses the same idea precisely; therefore by that record, introduced upon this record, I have a right to say, that the old corporation, created by Harry the seventh, remains obstinate in contempt, and out of possession of all its powers, from that time to this: and I say, it was not competent for the crown, by its charter, unless the court ordains the same thing, to restore it: I say again, it was not com-

petent for the successor of a former king, who had put in a corporation who might exercise the same functions which the old corporation had, to do that away.

Before I rose up, Mr. Wood thought he had found out a case, in addition to some others Mr. Topping had mentioned, and which, in my apprehension, does not go an inch further than to introduce an expression in the mouth of every judge almost, in giving judgment upon a record; that you must look at the *whole* record. The case of *Petrie v. Lord Portchester*, does no more than introduce that expression; but that must be *sub modo*; you will only take facts as they are introduced in their different lines of argument to follow the parties in a course of pleading; and they will go to draw the consequence of any one course of pleading, upon the ground of any fact they find in the course of that pleading; but they will not go to another line, and borrow a fact there, because in the first line of pleading the party admitted the fact for the purpose of argument.

I mean to say, in the first place, that both the replications are wrong, in point of description and language, upon substantial parts; if they are so, there is a total end of both replications.

If your lordships go into the whole of the case, taking the other parts of the replication to stand still in the situation of things as I have just argued, it was competent for Charles II. to do what he did; it was not competent for his successor to undo that; but if Charles II. had not done it, it would not be competent for James to have done it; inasmuch as it could only be done by introducing the charter in the pleadings, and be done by the power of the court.

Therefore I submit to your lordships, that the title of the defendant stands unimpeached.

Mr. Justice *Ashurst*. What do you say to the power of the crown to file an information of this kind against a corporation for being a corporation?

Mr. *Bearcroft*. It never has yet been determined in a court of law, that those proceedings are not right. I say, that the design of those proceedings in Charles II.'s time, being extremely bad, they got an act of parliament which uses harsh language about them, which they may deserve; but I believe your lordships will find, that in the general history of those times, it was constantly observed, that lawyers never thought the judgments illegal, however they thought the measures excessively imprudent: infinite are the precedents for that kind of proceeding; I believe that every one of those which have been handed up to your lordships, are of that kind: I am aware that there are particular names in one or two of them; but even those, where there are particular names, are proceedings against a corporation too, by its corporate name.

Then we stand in a case in which the current of precedents, wherever the proceeding has happened, has been in that form; we stand in a case where, from the nature of it, a variety of precedents must not be expected, because a variety of proceedings of that kind were not common; and the objection seems to me rather nice than solid.

The objection is this: "You, the prosecutor, blow hot and cold; for you mean by the prosecution to contend, that they are no corporation, but you proceed against them as a corporation." Now since we are upon comparisons between a writ of right and quo warranto, let me make a comparison: suppose a man whose name is John Thomas, signs a deed by the name of Richard Pearson, have not I a right to sue him by that name? and he cannot get rid of it by putting his right name. Therefore I am right in the outset of the proceedings, and it seems to me it is a fair comparison: I am to call upon some persons for usurping a franchise; what name do they go by? The name of the mayor and aldermen of such a place: I sue them by that name; and if they will take advantage of it (and this shews the necessity of the proceeding) they must plead in abatement, and shew, that this is not their name, but that they have some other. Therefore it seems to me, it is the necessity and the singularity of the case, that has produced that proceeding.

Suppose you were to proceed against all the individuals that form a corporation, which

which they say is the most regular way. In the first place, it is a thing which is next to impossible, and the law will not drive you to that kind of thing; how would Mr. Wood advise an information by quo warranto, or a writ itself, against any city? (except the city of York; I would not put him upon any thing of that sort) by naming the mayor, aldermen, common-council, and five or ten thousand corporators, common freemen? The law will not drive you, by its practice, to such gross absurdity; it seems to me that the difficulty of that proceeding admits of the other; and what is the objection to the proceeding? "I am not the mayor or an alderman of A. I am not what you call me;" I say it does not lie in their mouth to say so; they have promulgated themselves so to be to the world; they act as such; they must give up the point absolutely, or be content to answer to that name, and stand by the issue. Though the fact be true, there are numberless instances where it does not lie in the mouth of the party to aver that fact; and I defy them to produce me a decided case, in which it is the judgment of the court, that such a sort of proceeding is not right. There is a strong argument in the great London case, in quo warranto, against it; it is answered, however, by strong arguments; the result is, that there never has been a decision to the contrary.

Again, I will admit that it is error, but it does not avoid the proceedings; your lordships are to look at the proceeding upon the record, which goes to compel an appearance; the party has not appeared, and therefore is dispossessed of his franchise. If it be true, that is a bad mode of prosecution, they should have appeared and have said so, but they have not.

I contend, therefore, that whether this was or not an erroneous proceeding, it was a proceeding in a court of law which entitled the prosecutor to compel the corporation to appear; the corporation did not appear, and, therefore, the corporation put *themselves* in that predicament.

Mr. L E Y C E S T E R.

I Am to trouble your lordships on the same side.

I shall take for granted, during the course of my argument on the other points, that the pleadings stand as they ought to do.

In the first place, it is perfectly clear, that the defendant has made out his title regularly, under the charter of Charles II. then it is incumbent upon the other side, to shew something that is now stated upon the record, whereby that title has since been put an end to. In order to do that,—

In the first place they say, "the king's grant is bad in itself, because he had no power to make the grant."

Secondly, "If he had a power to grant, it is void, on account of the king's being deceived in his grant, and for matter appearing upon the face of the grant."

They then state, that supposing that does not avail, his title has since been defeated: first, by the order of amoval signified from the king in council; and lastly, by the charter of restitution. With respect to the first point, that the king had no power to grant, it depends upon the effect of the judgment, stated upon the record.

In order to make out that the judgment of seizure did not give the king a right to grant, I think these propositions have been laid down, viz. That a corporation cannot be dissolved, that it cannot be dissolved by a judgment of seizure, and that no judgment in fact can be given before appearance; but if it could, still this is a judgment *quousque* only. Then that a corporation cannot be sued by a corporate name; lastly, that the judgment can have no effect for want of a writ of seizure.

It is my business to argue these propositions in the affirmative.

As to the three first propositions, namely, that a corporation may be dissolved, that it may be dissolved by a judgment of seizure, and may be dissolved by a judgment of seizure before appearance, I shall consider them under the same head.

The proceeding in this case is rather anomalous, and I do not think we can throw great light upon it from reasoning by analogy to other cases. It may be necessary, therefore,

therefore, to consider the origin of an information in the nature of a quo warranto; and I shall, as far as I am able, point out the time when I conceive it originated.

That a corporation cannot be dissolved seems a bold proposition at this time, because I conceive that has been already determined in cases which I shall allude to by and by. They rely upon vague *disa.* There is no one authority upon which it has been adjudged, that a corporation cannot be dissolved, except the opinion of ten judges, which they say was given in the house of lords; upon which I shall make an observation presently. Before the *stat. Gloster, 6 Edward 1.* it is stated in *2 inst.* 280. that the king exercised a power of sending commissioners into the country, to inquire into rights and franchises; and if no charter was produced, the liberties were seized into the king's hands without any form of trial. In order to remedy that, the *stat. 6 Edward 1.* was made, "that if, before the justices in eyre, the parties come not, the franchise shall be seized into the king's hands, *nomine districtionis*; which the party in the same eyre might replevy, but if he did not replevy them while the eyre sat in that county, the franchises were lost and forfeited for ever. Therefore, if the party now upon the *venire facias*, which this act gives, come not while the eyre sit in the county, the franchise is lost for ever; and so it is in the King's-bench, if the party come not in upon the *venire facias* during that term, and replevy his franchises, they be lost for ever."

Now unless they can shew that the being of a corporation is not a franchise, I should be glad to know how they can shew that a franchise is not lost for ever, in the manner I have just stated. It seems to me, that against the authority of what is here laid down, no case whatever has been cited. I conceive that doctrine is expressly confirmed in a case that is extremely strong to the purpose, for which I am now arguing in the year book *15 Edward 4.* folio 7. as that is a case I shall considerably rely upon in the course of my argument, I shall take it rather at large:— This was a quo warranto; the writ was returnable in Easter term; the defendant did not appear, and then the question was, whether he should forfeit his franchise. By eight of the judges against two, it was held, that the franchise was gone for ever; two held that he might still replevin, the eight others held he could not replevin after the term, and the judgment of seizure was given unanimously. And it was there said, that if the party shew a good title he may retain his market; if not, then the king ought to seize it; and if the party might then have replevin, the king would lose the effect of his suit, and the party hath lost his market by his own laches, and the judgment ought to be judgment of seizure, and that it would operate as an *extinguishment*.

This case proves,

In the first place, that a franchise *may* be extinguished. If one franchise may be extinguished, I conceive the franchise of being a corporation may be extinguished. It is not stated in the case to be a franchise which the crown cannot grant; that brings it still more to the analogy of the case of a corporation. Then it states that the proper judgment was of seizure.

In the next place, this judgment may be given before appearance. It seems that this seizure is for the benefit of the king. The same doctrine is laid down in *Yelv.* 192. as to the difference when it should be judgment of seizure, or judgment of ouster. Sir Robert Sawyer, in his argument, constantly lays down the same doctrine, and the reason appears obvious, that if a corporation is usurped, the king cannot have that which never legally existed; but if it legally commenced, and has been misused, then the king shall resume that which he originally granted. That the judgment of seizure is the proper judgment seems confirmed in a case in *Co. entr.* 527. a quo warranto against a person for exercising a franchise in the borough of Henbury, and there is judgment of ouster because no such thing ever existed.

Then there is a strong case in *Co. entr.* 529, a quo warranto against a person for using several franchises; the defendant claims part by a grant of the crown, and as to the rest he disclaims. In this case, where it appeared that there was an usurpation, there was a judgment of ouster; and as to the franchises granted by the crown, there

there was a judgment of seizure. This rule is adopted in several cases cited in the London quo warranto, page 30 of Sir Robert Sawyer's argument; but it is said, that there is no case antecedent to the case of the quo warranto against the city of London, in which this seizure ever appears to have put an end to the corporation.

Sir Robert Sawyer has expressly mentioned two cases; one was the case of *New-Malton*, where there was a judgment of seizure, and that corporation has never existed since; the other, the case of *Berkhamsted*, where there was a judgment of seizure, and that corporation has never existed since.

Sir Robert Sawyer says, in page 30, the liberties of Oxford were seized in the 32 Hen. 3. for a great riot committed by the townsmen, when the king's brother was there, and killing his brother's baker, the king, in the same year, pardons them, and grants them restitution; therefore, it is clear that they must have been out of possession. In whose possession were they? undoubtedly in those hands into which they were seized.

The liberties of Oxford were seized again; part were again granted to the university, and they still continue there; and the same happened in the case of Cambridge; there the king, upon judgment of seizure, took possession of the franchises, and though he restored some, he granted part to other persons.

Then comes the case of the quo warranto against the city of London, and it seems to me that all the obloquy that has been thrown upon that judgment, must have arisen more from the severe advantages that were taken of the several inadvantageous acts of the corporation, than from the illegality of the decision of court upon that subject. And though one should not rely perhaps a great deal upon a case where judgment was given under the circumstances, which we know happened to relate to that judgment, by those judges; yet I think that argument is put an end to when we find all those arguments stated, so fully in the quo warranto cause, and where it is impossible not to see that the strength of Sir Robert Sawyer's argument infinitely preponderates above those on the other side. That is a case to shew that a corporation could be forfeited, and that judgment of seizure was the proper judgment. That judgment has never since been impeached; on the other hand, every thing that has passed subsequent to that judgment has established and confirmed it.

The first time afterwards, when that came into consideration, was upon the act of the 1 and 2 William and Mary. In a case in 4 Mod. 58, Dolben observed, the act did not say, that the judgment was void, but it was illegal and arbitrary: and it appears most clearly, from the provisions made in that act, that the legislature, at the time they passed it, considered the corporation of London as actually dissolved; that is clear from one of the provisions, that they shall still continue to be a corporation by prescription. If the corporation was not dissolved, where was the necessity for those regulations? It was said, that during this period they exercised the corporate rights: they might be permitted to do so; but in my apprehension, the mere exercise of those franchises, where it is so much for the public benefit that they should be exercised, proves very little.

Then comes Smith's case: the argument in that case has been much relied upon on the other side; in my apprehension, it much confirms the doctrine we are now supporting.

In that case, the question for the consideration of the court was, whether the corporation of London was or not dissolved by the judgment of seizure. The court do not give an opinion upon that point; but they expressly give the judgment of the court upon another point: the act of parliament was stated in the case, and they founded their judgment entirely upon the misrecital of the act; because the act says, the liberties of London were taken, and not, that the liberties belonging to the corporation were taken. If the judges had not thought that the corporation was dissolved by that seizure, but that the judgment was erroneous, they would have had little difficulty in saying so at once; being a popular opinion at the time, they would not have been reluctant in stating that opinion; they would not have referred to so nice, and in my apprehension so ridiculous, a distinction, as that taken by the judges;

judges; for it appears upon that case most manifestly, that the liberty of being a corporation was seized.

Mr. Justice *Buller*. The act was stated in the return, and they were bound to take the judgment in fact as the act stated it.

Mr. *Leycester*. They certainly took the advantage of a very nice distinction, in order to avoid giving an opinion upon the question, which, if it had been against the judgment in quo warranto, they could have had no difficulty about.

The recorder, in his argument upon this case, asserted, that lord chief-justice Holt said, a corporation could not, in his opinion, be dissolved; and he states that from 4 *Mod.* 58. When your lordships look into the report, you will see that lord Holt says no such thing: as it is reported there, the opinion of all the judges is confounded together as one opinion; and that is incorrect; because in 1 *Shower*, where it is most accurately reported, lord Holt expressly says, that a corporation may, in his opinion, be dissolved; when he says, he thinks a corporation cannot be dissolved, the reason he gives for saying that, is, only because it cannot be seized into the king's hands; if it could, he admits it might be dissolved: to which, Dolben says, he thinks it may be dissolved; and Holt says, he thinks it may be forfeited.

These cases prove clearly, that the seizure is a right judgment; and lord Holt does not himself positively say, he thinks it wrong; if it was wrong, there was no occasion to resort to the distinction which they took. The other judges did not much dissent from Holt, at least they had no decided opinion upon the subject; therefore I think I am authorized to assert, that there is no express authority which says, that a corporation cannot be dissolved; except so far as an authority may be derived from the opinion of the ten judges, supposed to have been given in the house of lords. The opinion of the ten judges is supposed to have been, that a corporation cannot be dissolved; it is so stated in *Shower*, and in a book Mr. Erskine has referred to, that is, Burnett's History of His Own Times.

This refers to an argument in arrest of judgment; and in looking into the journals of the house of lords, I find the question referred to the ten judges was, not whether a corporation could be dissolved? but whether the surrender of a corporation was illegal? That being the question referred to the consideration of the judges, I think the court will not presume that they went beyond the question referred to them, and gave their opinion upon a point not before them, which too was perfectly unnecessary, and upon which, at the time, there might be a difference of opinion; against that, we have nothing but the authority of Burnett's History: Burnett, not perceiving the difference between the illegality of suspending a corporation, and the dissolution of a corporation, might easily have mistaken. At all events, the court will not presume that the ten judges gave an opinion beside the subject, to prove, that a corporation may be dissolved. I shall refer only generally to that case which has been cited from *Burrow*, where this court appear to be of that opinion; they were not then considering whether it might be judgment of ouster or judgment of seizure: I only refer to that as an authority that the court of King's-bench was of opinion, that a corporation might be dissolved. As to the argument that the several cities against whom there were judgments of seizure, have still claimed their privileges; and that restitution can have an operation different from what it might in any other case, for the public convenience and benefit; or whether this point has been not sufficiently considered in those cases, is not for me to say: it appears rather, that the difficulty has not occurred; if it had, it must necessarily have been argued. Therefore the fact of claiming by prescription, where it has not yet been adjudged whether they may claim by prescription or not, is no argument at all against the authorities upon which I now rely.

Mr. Erskine's idea, that until appearance there can be no judgment, is perfectly answered in the cases I have cited. And the absurdity of that proposition is apparent upon a moment's consideration; because then the consequence would be this, that wherever a corporation had nothing which could be distrained (which may frequently

frequently be the case) that corporation may go on from day to day exercising their privileges, and abusing them, and yet there would be no possibility of redress: and the case Mr. Erskine cited from Jenkins, which says the reverse, is an anonymous case; we do not see who the judges are; it is laid down as an authority, and he cites 15 *Edw.* 4. to support it, which is directly the reverse of the proposition laid down in Jenkins. But whatever doubt there may be whether a corporation may be dissolved, I think no doubt has been entertained, before the present day, whether they may be ousted of those liberties by a judgment of seizure; this seems to be admitted by both Treby and Pollexfen, in the quo warranto case, p. 13. 105, 6.

If by the seizure they are forfeited (which seems admitted) then the king can grant them just the same as he can any other thing that is forfeited; and it seems to me that the cases which have been cited, where the king has appointed a *custos* to preserve the corporation, under a judgment of seizure, he has actually exercised the power of granting, and he has granted, something which actually fell into his hands; it appears at some times he has restored all the privileges, at other times he has restored part to them, and granted part to others.

The next objection is, that a corporation cannot be sued by their corporate name. I shall only refer generally to the cases cited upon that subject in the quo warranto argument. It appears that in cases of quo warranto, where the information was brought against them in their corporate name, the judgment was not impeached; if that would have made the judgment void, as is contended here, where was the necessity for the act of parliament, and all the arguments which took place in Smith's case? that is an authority then entirely in point. Mr. Erskine says, they may forfeit if they abuse their privileges, but the information must be brought against natural persons.

This information is brought against persons who are in the visible exercise of certain rights; then before a plea comes in, it is not known by what authority they exercise those rights; that is to be determined by the plea. If the plea states a title to the privileges, then the judgment goes upon that title, either for or against them. If, upon the plea and upon the judgment, it appears that the privileges have been usurped, then there is a judgment of ouster against them. If it appears that the privileges have been misused, then a judgment of seizure; but that cannot be known till the plea comes in and judgment is given; but if they do not appear, *non constat* whether the liberties have been usurped or abused, and therefore, in that case, it is stated in the books, that where they do not appear, and judgment is to be given against them, or if it is uncertain whether the franchise be usurped or granted by the king, it is a judgment of seizure.

Till judgment is given they are a corporation *de facto*, they exercise privileges, and therefore I conceive most clearly, both from the reason of the thing as well as the authorities I have stated, that the information was properly brought against this corporation by their corporate name.

Supposing that a judgment of seizure, either dissolves the corporation or takes the franchises into the king's hands,

The next question is, whether this judgment of seizure can have that effect because of the words *quousque*, &c. that are added to it.

I shall first consider the natural meaning of the words, independent of any authority or case upon the subject.

A judgment that the liberty shall be seized into the king's hands, if it stops there, is absolute; if it goes on there is a qualification annexed to it, and the qualification seems, in the nature of a condition, subsequent. It says, the liberties are vested in the king, subject to be divested by order of the court, and by that only; till, therefore, such order has been made, those liberties are in the king, and it is not as Mr. Wood has said, that the king cannot touch them till something has been done by him; but I contend that something must be done, by somebody else, to prevent his touching them, and that when we consider the legal import of the words,

words, according to the authorities and cases, this interpretation will not operate in any respect to the disadvantage of the defendant.

It is laid down 2 *infl.* 282, that for non-appearance, there is to be judgment of seizure, "which the party, in the same eyre, might replevy, but if he did not replevy them while the eyre sat in that county, the franchises were lost and forfeited for ever;" this judgment seems to follow upon that. No mention is made there of either a first or a second judgment, but only that they shall be seized, and if they do not replevy within a certain time, they cannot replevy at all.

It seems to me, therefore, that upon the first judgment, they were seized, and seized irrecoverably, unless the party come in time; there is no occasion, therefore, for a second judgment, there are many instances stated in the quo warranto cause, in which the words *quousque*, &c. seem to have been omitted, and where the first judgment of seizure has been made absolute. In 2 Roll's Reports, 46. there was a quo warranto against Bridges; Bridges did not appear at the time, and there the judgment was, that the liberty should be seized; there the word *quousque* is not used. This seems expressly to be held in the case I before cited, 15 Edward 4. folio 7. that was another case where a judgment of seizure, by default, as absolute in the first instance, and there it is expressly held, that the party could not replevy after the term in which the judgment was given. I conceive, that whether the judgment is with or without *quousque*, the party hath no right to come in after the term and replevy; and though that may have happened in the case of the city of York, it might be done without opposition or by consent.

To Mr. Erskine's question, within what limitation of time the party is to replevin, I answer, unless it be by consent, the limitation of time is during the term in which the judgment is given, and I answer by the authority of the case in 2 *infl.* and the case I cited before from the year-book.

By this judgment the liberties are in the king irrecoverably, unless the king thinks fit to revive them afterwards, and the court without such consent, under the authority in the year-book, have no right to suffer the party to appear and to divest the king by that appearance.

Mr. Erskine has said, that a seizure *quousque* does not take away the privileges because there must necessarily be a final judgment of ouster—I say a final judgment would not be a judgment of ouster; if final judgment was entered up here, it would be sufficient to state it in the very words that are now upon the record. The case cited by Mr. Erskine, from 1 Lord Raymond 17. in order to prove a judgment of ouster necessary, proves no such thing; the proposition laid down in that case was, that there must be a regular and proper judgment of the court, and the court in that case say, "if the court should say he has no title to the franchise, it avails nothing, unless they proceed and say, *ut abinde excludatur*."

Therefore your lordships see, that the only proposition that is laid down in that case is this, that the courts, saying he has no title to the franchise, is not a judgment, there must be a regular legal judgment; to be sure there must, and they go on to say there must be a judgment *ut abinde excludatur*.

Mr. Erskine says, "if the king should grant, during that term, and the party comes the next day, what then?" I answer that the king's grant might or might not operate if he did. If the king granted within that time, which the law gives the party to come in and appear, perhaps that grant of the king might not be permitted to have any operation; but here the king has not granted, during that time, and your lordships will observe, by looking at the dates of the judgment of seizure, and afterwards at the date of the grant, that the judgment of seizure was of Hilary term, the 35 and 36 Cba. 2. and the grant is dated February, in the 37 year of Cba. 2. therefore this grant of the king was near a year subsequent to the term in which the judgment *quousque* was given; so that at the time the grant was made by Charles II. the party could not, by law, come and make his appearance, and claim his franchise without the king's consent.

As to the hardship that is stated upon the corporation, of their liberties being seized

without notice, there is no hardship in the case, because they have notice by the *fiere facias*, and if they do not come in they lose their liberties by their own *laches*.

It is said, "that judgment of seizure is only process to compel appearance." No case is cited to prove that proposition, on the contrary it is contradicted by the cases I have cited; if it is process, now it must have been process before the justices in eyre; if before the justices in eyre the default was made, the franchise was lost for ever; that is, if the party did not come before the justices in eyre left the county.

The same observation applies in the present case, suppose the judgment is given the last day of the term, can it be said that that judgment is to be a process to compel appearance? when if they do appear, subsequent to that term, that appearance cannot be entered; because, if they have no right to appear subsequent to the term, then it would be absurd and ridiculous, to say, that process was meant to compel appearance. This case has been inadvertently likened to others, to which it has no analogy; because judgment in *quo warranto* is an anomalous case, and you cannot argue it much by analogy to other cases.

It has been just hinted at, that there is no office found. The necessity of an office being found, to entitle the king to that which he claims, arises under an act of the 8 Hen. 6, cap. 16, which relates only to lands and tenements. In cases where it does not appear what the lands and tenements are, the king is to seize; that applies to cases where there are judgments of attainder, and the lands and tenements have been forfeited, and where it does not appear what those lands and tenements in fact are: in that case there must be an office found.

The next question is, Whether there is a necessity of a writ of seizure? With respect to the necessity of the writ of seizure, if it is necessary in this case, I conceive it necessary in every case. Suppose a corporation has nothing which can be seized; How can a writ of seizure have any operation upon liberties which are not either tangible or visible? I conceive the judgment, therefore, is in this case sufficient in point of law. And the case in *Sav. 70*, which has been cited to prove the necessity of a writ of seizure, speaks only of an office found. The case in 9 Co. 96, does not prove the proposition, but the very reverse. It says, in some cases, the king shall be in seisin, without any office found, or seizure, as in lands and tenements, &c. which are local; as where it is found by office that a condition is broke. That case does not at all prove the proposition intended to be proved by it; namely, that a writ of seizure in this case was necessary. Your lordships will observe, that no case has been cited, where it has been expressly decided, that a writ of seizure is necessary.

I shall submit to your lordships a case, in which it has been expressly decided, that it was not necessary; that is, Smith's case, 1 Show. 275. In that case, the attorney-general argued, that the judgment in *quo warranto*, in the case of the city of London, was, that the liberty should be seized, and that it never was; that no writ of execution went out against them, and therefore nothing was altered, or was taken from the party, till a writ of execution. Lord chief justice Holt says, there needs no writ of execution; for, in a *quare impedit*, if judgment be against the incumbent, the patron presents without any more ado. It is observable, that nothing farther was said, by the court or the bar, upon the subject, and therefore that was perfectly acquiesced in.

Mr. Erskine has said in the cases mentioned by Sir Robert Sawyer, there had been seizures in fact: now it does not appear that any writ of seizure ever issued, except in the case of Oxford and Winton. As writs of seizure are stated in these cases to have issued, and are not stated to have issued in any other, it is fair to conclude, that they did not issue in the other cases, or else Sir Robert Sawyer would have made use of them in his argument. But Mr. Erskine says, "You cannot levy without seizure." If the judgment of seizure is sufficient without a writ, then they can levy without any seizure. As to the case of York, Mr. Wood says they replevied, because there was no seizure in fact.—That did not at all appear.

The only other case to support this proposition, is that of Malmesbury, which

judgment, it is stated, " Was reversed, because no judgment of seizure or ouster can be given against a corporation for want of appearance." Mr. Lane says, " On what ground the reversal in parliament was had, it is impossible to know but by conjecture; but it was, perhaps, because there was a final judgment where there had been no appearance;" and he gives several different reasons why that judgment might be reversed.

It is a convenient case then; for this is an authority upon every proposition that can be laid down upon this subject; it is made use of like a general specific, which is to cure every disorder: it does not appear upon what ground that judgment was reversed!

I have hitherto endeavoured to prove that a corporation may be dissolved by a judgment of seizure, for default, that *quousque* is a mere matter of form, and that no writ of seizure was necessary. If the king had a right to seize the franchise, though the being of the corporation might not be dissolved, yet still having seized them, he had a right to grant them: I conceive he had a right to grant them to a new body, in the same place in which the former corporation existed; for though I admit that two corporations cannot exist in the same place, I conceive that proposition must be taken with this restriction:—two corporations cannot exist together in the same place, with the same privileges and powers, because they would be incompatible with each other, but twenty corporations may exist in the same place, provided they do not possess liberties inconsistent, interfere not with each other.

Supposing here is the capacity of a corporation still subsisting, but totally divested of all those privileges and franchises which were before annexed to that corporation, what reason can be assigned why the king cannot make a new corporation to exist in the same place? and vest that new body with those privileges and franchises which the king has granted to that new corporation? Is there any thing repugnant in it? Do they interfere at all? Here is a sort of *caput mortuum*, a sort of political incapacity to which no franchises are annexed, hovering about the city of Chester; and the consequence of the doctrine, that till it is formally put an end to, no new corporation can exist—would be, that the city of Bristol, and many other places, and the city of London, if it had not been for the act of parliament, might be without any corporation at all, of which the mischief would be infinite. If the court think the king was not so fully in possession as he would have been by a final judgment, but that the franchises were suspended, still I conceive he had a power to grant, 1 *Rep.* 49 B.—If the queen had a qualified fee simple in certain land, that is to say, as long as a person attainted hath heirs of his body, and she grant the land to another and his heirs, the grant is good: so if the queen hath an estate in fee simple, conditional, and grants the lands to one and his heirs absolutely, it is good, for in both cases the queen hath a fee simple, and grants a fee simple, and her grant stands well with her estate.

Your lordships see there, if the queen had an estate in fee simple, conditional, at the time she grants the fee simple, yet her grant of that fee simple is a good grant; so suppose the corporation was suspended, and the franchises were in the king, subject to be divested, yet still the king having granted that power, subject to be divested, he has granted them as the queen did, and therefore that grant is good, unless the condition afterwards happens upon which it is divested. It is laid down in *Bro. Abrid. tit. Chose en Action*, that the king may grant a chose in action; and to the like purpose, the same book, *tit. patent* 46.

The same doctrine is laid down in *Jenk.* 210. The effect of that case is, that mere possibilities may be granted.

I think, therefore, that those cases establish this proposition, that a fee simple estate in the king may be granted. Mr. Wood says, " The king is deceived in his grant, if having it subject to renovation, he grants it in fee." I think the case cited, with respect to the queen, disproves that proposition. In the next place he is *not* deceived in his grant in that case, for the king might know that he had such

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an interest subject to be divested; he does not state the power that he had, and therefore till such order, he had the interest, which in fact he granted, and which is most like the case of a qualified fee simple.

With respect to the argument of Mr. Milles, that this grant was made to the old body, I think I need not trouble the court with any observation upon that.

The recorder has stated, that he conceives this grant is void, because seven persons are disfranchised by it: the grant is to a certain number of persons, and all it says, is, "Those seven persons shall not be the objects of my grant." The recorder might just as well say, that if I was to give a guinea a-piece to several friends sitting by, and would not give one to the recorder, I cheat and defraud him of a guinea; it would be just as applicable to the argument: but I conceive, that even if your lordships should be of opinion that he could not rightly grant, yet I apprehend that this grant is good, unless it is repealed by *scire facias*, or by that mode which the law has established. I shall state few cases to support that proposition, *Bro. Abrid. title petition, pl. 12. tit. Jurisd. 102. tit. Sci. fa. 58, 63, 173. Dyer 197, 8, and in 3 Lew. 220.* that proposition is laid down in all those cases that the grant is good, till it is repealed.

The next question is, whether any thing has been done since, to put an end to the effect of that grant. There are two things stated so to do; first, the order of amoval; secondly, the charter of restitution.

As to the power of amoval, I think it depends upon the construction of that grant.

Mr. Erskine has said there are two ways by which a deed is to be construed; first you are to construe the intention of the parties by the words; secondly (which seems to me a new way of construing the charter) by the act of the party. I should be glad if Mr. Erskine had cited any authority. I conceive a deed, though in the case of the king, must be expounded according to the same rules by which a deed of a subject is expounded. By this means Mr. Erskine makes the grantor, in the present instance, to be the expounder of the intention of Charles II. although they had directly opposite intentions upon the very subject to which this grant applies; and therefore, though Charles II. meant to destroy one corporation, and James II. intended to set it up again, yet you are to construe the intentions of him who set up the corporation, and him who meant to dissolve it, by the act of each other—to state the proposition, is a sufficient answer to it.

Mr. Erskine says the king never dies, and therefore you are to expound the intention of one king by the act of his successor. I conceive intention is a matter of fact, and then the technical argument, that because the king never dies, therefore the king who lived in one time, is to have the same intentions as the king who lived in another, is a proposition my friend's ingenuity must have been put to the stretch, to suggest to the court. As to the admission of the parties by acquiescence to the deed, that I conceive is no argument; it is no objection to the court's putting a construction upon the charter (as Mr. Topping has observed) an hundred years after; it is more likely to receive a good and valid construction at the distance of an hundred years, and when animosity and heat cannot have the effect upon those who are to decide, as it would have had at the time. I apprehend the true way of construing every deed, is by considering the words of the grant altogether; I conceive the deed clearly means this—not to destroy the corporation altogether. Your lordships observe, without referring particularly to the words that the king is supposed to intend to put an end to the corporation, to remove them all, and yet in that very charter he expressly provides for the continuation of the corporation, under the very exercise of the reserved power.

If this clause therefore is bad, the recorder has said the whole is void, for the king was deceived in thinking it good; whether he was deceived or not, depends upon his meaning; for if he did not mean to reserve a power to amove them *all*, then the king was not deceived in the grant; if a power of removing all has not been reserved by the charter, which I conceive it is not, then that power has been unduly

unduly exercised, and the conclusion that all were removed, is false in point of law. If the court should think that such power is reserved, I conceive that reservation is repugnant, and void in law. It is repugnant, because in the first clause the king gives them a power of existing for ever; in *Shep. Touch* 85. *Hard.* 94. if two clauses in a deed are repugnant, the first shall be received, and the last rejected.

In *Bro. Abri. title lease* 22, there is this case; if one make a lease for ten years, at the will of the lessor, this is a good lease for ten years, and the latter words are void for the repugnancy; that is like the present case.

Mr. Justice *Buller*. As between subject and subject, there is no doubt of it; all your cases are so.

Mr. *Leycester*. All to prove the repugnancy are so, 2 *Inft.* 486.—Here is an excellent rule for the construction of the king's letters patent, not only the liberties, but the lands, tenements, and other things, which he may lawfully grant, that they have no strict or narrow interpretation for the overthrowing of them, *sed secundum earundem plenitudinem judicentur*, that is, to have a liberal and favourable construction for the making of them, available in law *usque ad plenitudinem*, for the honour of the king. In *Jenkins* 255, it is said, the case of a grant from the king shall be like the case of a grant from one subject to another, if the king be not greatly deceived; and in 17 *Vin. Abr. title prerogative*, page 100, there are rules laid down for the construction of the king's grants, and a variety of cases are cited to support them; in 6 *Rep.* 55, there is this case; where the king has granted an estate in fee where he could only grant a reversion, yet it was held that it should not be void for that: the same proposition is laid down in *Skin.* 663.—Your lordships observe here in the first place, the grant is *ex certa scientia et mero motu*. In the second place they are the words of the king; for that is relied upon in some of the cases I have cited. In the third place it is no false suggestion of the party; the corporation could not suggest such a thing themselves. In the fourth place here is no deceit or mistake in point of fact; it cannot be supposed, but that if there is any mistake at all, it is a mere mistake in point of law, and not the condition upon which the grant is made.

As to the case cited from 2 *Freeman*, it is said, that where the king is mistaken in matter of fact, there his grant shall be void, but not where he mistakes the law. But the court seemed to incline that the grant was void, it appearing upon the face of the grant, that the king was deceived in the very substance of the grant, and the rest being intirely reserved out of the whole; therefore that which seems the strongest case, which is most relied upon on the side, does not apply, for there it was as to the *substance* of the grant, and in that case the court gave no judgment.

If it was then obvious upon this charter, that the king meant to reserve a power of amoving all, yet I conceive from the authority of these cases, that the charter is not void, but only as to that part; if he meant *not* to reserve a power to amove all, the argument is stronger; in 1 *Vent.* 20, it is held by three judges, that the king and council might disfranchise any member of a corporation: whether he might do that or not, it is not necessary for me to contend; I conceive he might reserve a power of removing them in the way he has done here, and that is not void for repugnancy, because the corporation that is granted may subsist for ever, notwithstanding a power of removing certain individuals is exercised, but at all events it does not avoid the whole grant.

The next question that arises, is upon the charter of restitution.—Supposing this charter of restitution was not granted to the new body (which clearly it was not) then the king cannot grant what he had before granted—he had *before* granted to the new corporation; and it is laid down in 1 *Rep.* 45, 51, that if the king grants to one, and then grants to another, the latter grant is void. The same doctrine is laid down in *Jenk.* 126.

Then considering this charter of restitution as a grant, and I conceive it can have no other effect to operate but as a grant, it certainly cannot give one body what it had before given to another. Your lordships see there is no reversal of the judgment; the party has never come in to reverse the judgment.

Now

Now this charter of restitution is, in fact, nothing more than granting to that old corporation privileges which he had before granted to the new one. They are both voluntary acts of the king, a party is claiming under one voluntary act against another voluntary act. It is laid down in 3 *Inst.* 236, that by the antient and constant rule of law, *non poterit Rex gratiam facere, cum injuria & damno aliorum quod autem alienum est dare non potest per suam gratiam*; if therefore the former grant was good, it was not the king's at the time of the restitution; he had nothing to grant. It was likewise said, 3 *Inst.* 240, that the reason why the king may by his charter pardon the execution, and restore the party or his heirs, to the land forfeited by attainder, and remaining in the crown, is, for that no person had thereby any prejudice; but to make restitution of his blood, he cannot do it but by an act of parliament, because it should be to the prejudice of others, 2 *Mod.* 52, and *Bro. Abr. Charter of Pardon*, 44. are to the same point, and *Skin.* 676.

I shall make but one single observation upon the pleadings, in addition to what Mr. Bearcroft has stated:—They have only stated a power, appearing upon the record, to replace, in case of the amoval of *some* of the corporation, but they have not stated by reference, or otherwise, what power there is to re-elect new corporators, in the case which has now happened, of the removal of them *all*; and, therefore, that, in addition to the argument of Mr. Bearcroft, will, I trust, satisfy the court, that the replication is bad.

Mr. B O W E R.

IT becomes likewise my duty, as one of the counsel for the defendant, Mr. Amery, to trouble your lordships with some observations upon this case: and I shall, after the very laborious research which my learned friend, Mr. Leycester has made for cases upon the subject, spare a good deal of the time of the court in what I have to offer.

And whatever apologies I may have occasion to make in the course of this proceeding, I think the court will excuse me from making any, on account of that reproach which my learned friends on the other side seem to have thrown upon me, for not specifying all the objections I had to make, when I applied for a rule to shew cause. It is not usual for a counsel, when he applies for a rule to shew cause, to state specifically objections and answers, the very stating of which, in this case, has taken up nine hours argument. I shall not attempt to answer particularly every question they have thought fit to call upon me personally to answer, every question suggested to their imagination; and to explain every reason which might, or might not exist, and which might or might not have had effect upon my mind at the time: I was neither counsel for the city of Chester, at the time of Sir Robert Sawyer's quo warranto, at the time of Charles's granting the charter, nor during any of those transactions. I conceive that to be a sufficient excuse for my not answering for every misconduct relative to this corporation for the last century.

I shall not trouble the court upon what I call a preliminary point, namely, whether a corporation can be dissolved by the crown.

It has been asked, "What arguments are there to shew, that the crown can call upon the corporation, by its corporate name, to answer for its assuming or usurping the liberty or franchise of being a corporation?"

I shall not assume to myself the merit of any inquiries which do not properly belong to me, and I will freely confess that I have, in the course of this business, availed myself most fully of all the arguments which have been used on both sides, in the case of the quo warranto against the city of London; and it is from what was stated by the learned counsel who argued that great question that I derive the principal information I have upon this subject; and whenever your lordships come to look at those cases, the particular passages of which, applicable to this argument, have been cited by the counsel on both sides, it will be for your lordships to judge whether or no the weight of argument appears in favour of those objections which

which were stated (for I will presume to say, none have been stated to day which are not found in the argument on that case) or whether the answers given to them are less satisfactory; and when your lordships come to look at the arguments used by Sir George Treby, on one side, and Sir Robert Sawyer for the king, on the other, you will, in those arguments, have got all the law upon the subject; if there is any part of Treby's argument which disgraces it, it is one upon which the gentlemen on the other side have principally relied.

That part of the argument upon which the gentlemen have founded what they have offered to the court, is a collection of as metaphysical subtlety and refinement, not to say scholastic jargon, as can be found in the argument of any man of learning or eminence in the profession.

It should seem that Sir George Treby having raised to himself a pleasant idea of a capacity which he personifies and pursues through a variety of stages, is so pleased with himself, that he forgets what the question was before the court at the time, and forgets the simple idea of what is a corporation aggregate; and if there is any sense in what Treby says upon that business, your lordships will see it can only be applicable to a corporation *sole*, but not to a corporation *aggregate*; the ideas of which are as perfectly distinct, as totally separate, as any two things that can be conceived, the ends and objects of each being precisely different.

The principal object of a corporation sole is, to preserve an imaginary being in existence, when the natural person, who while alive sustains the character, shall be dead. That is the principal and primary idea of a corporation sole. The single idea which necessarily enters into the constitution of a corporation aggregate (whatever other powers and capacities it may be endowed with, and which are merely accidental, and may be given, part in one way, and part in another, to a body aggregate, modified and formed according to the pleasure of the grantor) is, that they shall be natural persons united together, who may speak with one mouth, and act as one man, for the purpose of convenience, and for carrying into execution those purposes, which could never be executed, if all the natural persons were to be called upon. It seems, then, that every argument, which may be used when you come to speak of a corporation sole, must operate against sustaining such a corporation when you consider the case of a corporation aggregate; and then, the privilege being granted from the king, the effect of it is merely this; that when a suit is brought against a corporation aggregate, by its collective name, every individual is as much called upon in that suit, as if he was particularly named. It is the only meaning of a corporation, and the only convenience for which it is established. Then I shall be glad to know why the same must not hold when it becomes necessary to question the conduct of that corporation, for criminal acts done by it, which may make it proper that that corporation should no longer exist? Whenever an information is filed against a corporation in its corporate capacity, to answer for the misconduct which may be the subject of that inquiry, the very purpose of that corporation requires, that the individuals composing it should be called upon, by their corporate name, to give an answer, in that name, for that corporate offence, (and when a corporation is so called upon, it may be said to be trying it for its life) to shew why, in consequence of that misconduct of which it has been guilty, its political existence should not be put an end to: That seems to me, therefore, an answer, in some degree, to the question thrown out by one of the learned judges, as to the good sense of calling upon a corporation in this manner; and I the rather state it to your lordships, because it does furnish a pretty strong illustration, in my apprehension, of an argument which has been used by Mr. Leycester, when he stated (as the fact certainly is) that there cannot be two corporations in one place with the same powers, yet, if all the franchises of one corporation are taken away, and granted to another, there still is no impropriety in supposing that there may be *another* corporation existing, with a capacity to take any thing the king may afterwards grant, not inconsistent with that grant which he has given to another corporation.

Indisputably

Indisputably you may put two bodies in any place, supposing the powers vested in each do not clash with each other; and therefore, I think that Mr. Leycester has very forcibly stated that part of the case: and if it is once admitted (as I think it must be) that the franchises, in this case, are a subject of seizure, and we can shew that they were actually seized and given away; the objection that there is another corporation, which may be called into existence, when the king shall think fit, for other objects, will have no great weight.

The cases cited to shew that a corporation cannot be dissolved, are all answered in the quo warranto case; your lordships will find them in the several matters alluded to by the counsel; they are collected principally by sir Robert Sawyer, in pages 15, 16, and 31, of his argument.

The cases that have been cited in opposition to the doctrine which your lordships will find there, and which I purposely omit to state, that I may avoid repetition, are the dean and chapter of Norwich's case, 3 Co. 73. the same case from *Ander-son*, *Hayward v. Fulcher*; the same case in sir *William Jones*, 166. And, I think, when the court come to examine into those cases, not one will be found to apply to the purposes of the argument for which they were adduced; and if I were disposed to retort upon my friends the kind of treatment I have experienced in this cause, I should say, I was astonished to find how the ingenuity of the gentlemen should have applied these cases in the manner they have done!

They turn upon this question, Whether the seizure of a corporation is a seizure of the liberty of *being* a corporation? and the court held, and I conceive properly, that when a corporation is only questioned, or when the surrender is only a surrender of their liberties, they do not construe their acts to be stronger or broader than their intention, they only say, that under the words which import to be only a surrender of part of their liberties, they shall not extend them farther. The cases in *Palm. 502. Bro. Corporation 78. 3 Burr. 1656*, are all cited for the single purpose of shewing that the king cannot dissolve a corporation by his own authority. If it is meant to be contended, that he cannot, without any act of the corporation, dissolve it, it is a proposition that never entered into any of our imaginations to dispute; I admit it in the fullest extent.

I will now state the reasons which occur to me, why, upon each of these issues, as they appear upon the record, the defendant is intitled to the judgment of the court, notwithstanding the jury have found them against him.

The first issue depends intirely upon an order of amotion, as stated in the pleadings, supposed to be made by James II. and his privy-council, in pursuance of an authority residing in him; and upon this part of the case, I trust, that if I state any thing to the court which appears to differ from what has been urged by my learned friends who went before me, with so much force, it is not that I differ with them in the argument, but that I think it material to state matters in a different light; leaving the court to judge which argument they will select, if they think any of it worthy their attention.

I shall, in this part of the case, consider the two points which the gentlemen suppose bring us into a dilemma; which Mr. Erskine states to be the most complete of any he ever remembers in the course of his professional studies. "The power of amotion is either," he says, "*legal or illegal.*"

I will, first, suppose that there may be such a legal power as that reserved by the charter of Charles II. namely, that the king may remove all or any of the corporators of a corporation, at his pleasure; will it follow, when I have made that admission, that the king, by this charter, ever intended to reserve any such power? I agree with him, that the intention is to be considered, but it is to be collected only from those instruments; therefore, when I come to argue upon the intention of the king it will be for the court to say, whether, upon the whole of this record, they see that Charles II. at the time he made the reservation, stated in these pleadings, meant to reserve a power to himself of removing *all the corporators at once*, so as to put an end to the corporation at his pleasure. Whoever reads this with com-

mon attention only, will see that the king meant no such thing ; if he did, his meaning is directly contradicted by his act. I take it at present, for the sake of argument, that the prosecutor has a right to refer what is stated in this replication to the plea. Then it is; that the king reserved to himself full power and authority, at his free will and pleasure, at all times hereafter, &c. by his order in council, to amove the mayor, &c. or any one or more of the aldermen, common-councilmen, &c. of the said city, for the time being ; and that when any are so amoved, the residue shall elect others in their stead. Supposing then that the manner of election is to be referred to what is stated in the plea, that mode of election is, that when the mayor, or one of the aldermen, shall be removed, the residue of the aldermen shall meet and elect another (I state the substance;) yet when the king reserves a power to amove all or any of the corporation, and expressly says, that when any of them are amoved, the residue shall elect others in their place ; is it to be supposed that the king should reserve a power to do an act which is perfectly inconsistent with the intention manifest upon his letters patent ?

Your lordships will take it too, that it is averred in the plea, and not denied, that ever since the charter there have been 24 aldermen in fact, so that if the amotion did not dissolve it, there is nothing like an admission—that by the amotion the corporation was, in fact, dissolved. That brings it to the single question, whether that signification of the king's order in council, was by law *ipso facto*, an amotion of those corporators. Taking the whole of the plea and replication together, it is manifest these aldermen were elected under the charter, and that they continued to the moment of Mr. Amery's election, for he states his election to be a continuance of that corporation ; therefore there is nothing stated like an admission, that they did, in fact, abandon their offices, or were, in fact, amoved : but the single question which the court have to consider, is the inference that they were *thereby* amoved, which cannot be the case if the king is exercising a power not reserved to him by the words of the charter.

It was stated by Mr. Erskine, that it was the *ne plus ultra* of the king's grant. The court must surely see that that is begging the whole question ; it is taking for granted what the king's grant is, to raise argument that that construction would be narrowing it ; whereas I contend, that the question here is, what the king's grant is, according to the intention he has expressed ; and I argue, when he has shewn his pleasure how offices shall be filled up, that it is manifest, that it was not the intention of the king to reserve a power to dissolve the corporation.

It was asked, with some triumph, " If the king could amove one or more, where the line was to be drawn ?—" why he might not amove every one of them ?" to that I answer, that when he has signified so many orders of amotion as not to leave a competent number of electors, then he exceeds his authority, and then his acts become void, as soon as he has exceeded that limit which he has prescribed to himself.

The other part, however, is now to be considered, and that is—whether or no this power reserved by the king, is or is not legal. I do not see that the gentlemen have made out, in any possible way, how it is that this power of the king is illegal. I must entreat your lordships attention to the cases they have cited in support of the position which they think they have made out, that if this reservation was illegal, then the whole of the charter is so too. The cases they have cited for this purpose are, 2 *Roll. Abr.* 164. 2 *Inst.* 533. *Co. Litt.* 31. 5 *Rep.* 55, b. 2 *And.* 155, 6. and 1 *Co.* 43, b. I have looked at all those cases, and I will shortly state the substance of them by way of answer to all their inferences from them.

The case in *Roll. Abr.* proves that the king cannot grant that an estate shall descend contrary to the rules of law ; but it proves this point, that if the king inserts a reservation in his deed that is against law, the grant is void ; the king's grant is here good, complete, and perfect, but the thing which the king grants, in the case put in *Roll. Abr.* is, that an estate shall subsist, which the law says shall not subsist ; and therefore it is taken for certain, he never meant to grant that which is against the established rules of law.

The

The case in 2 *Inst.* 533, is nothing more than this;—that the king cannot lay taxes and impositions without the consent of parliament, and cannot create new offices with fees to be paid by the people; where he does, it is void. The king there was exercising a power which the law has not entrusted him with, and therefore he could not have done it, if he had not misunderstood and misapprehended his power.

The next case is a question, whether taking a person arrested upon a *capias*, to Lambeth, in Surry, is an escape?—and how it is applied to this case I cannot possibly conceive; it is probably taken from some marginal abridgment, and stated without looking farther.

The case in 5 *Rep.* 55 *b.* is that of the Duke of Chandos; and it is there held, that if more would pass by the king's grant, than he intended to pass, his grant shall not be good; but in the very same case it is held, that if the king be mistaken in the law, and not be misled by the suggestions of the party, it shall not avoid his grant.

In the case in 2 *And.* it appears, the king was mistaken in the kind of estate he had, and granted it in such a way, as it is plain he did not in the whole of the grant intend. That comes within the rules.

Another case was cited on the other side, and noticed by Mr. Leycester, from 2 *Freeman*, 17; and it appears to me, that the king there is held to have been mistaken in his grant, for the mere purpose of benefiting a subject who would, if the grant was taken to be as made by the king, be liable to pay a rent of 10,000*l.* a year, without having the estate granted: the case was this, the king leases a manor and mines, and withal grants, that the lessee should have the sole vending of allum, reserving out of the premises 10,000*l.* per annum to himself, and 1640*l.* per annum to lord Mulgrave. The question was, whether or no his grant being void for part, viz. for the sole vending of allum (which the king could not grant) should be void for the rest: If it were in the case of a common person, it was held, that it might be good for part, although the reservation was intire. A strange case seems to be put by the chancellor:—If a man lease land, and a flock of sheep, and all the sheep die, yet the rent shall continue. But it was urged here, that the king is deceived in his grant, for it is plain, that he intended to grant the sole vending of allum, which he could not do; but sir J. King took a difference, where the king is mistaken in matter of fact there his grant shall be void, but not where he mistakes the law, and cited lord Chandos's case, 6 *Rep.* 55. but the court seemed to incline that the grant was void, it appearing upon the face of it, that the king was deceived in the very substance of the grant, and the rent being entirely reserved out of the whole; *sed curia advisare vult.*

Therefore this which is supposed to have proved the point so decidedly, is a case where, in fact, nothing was decided; and where the only doubt of the court was, whether they should saddle a subject with paying a rent of 10,000*l.* a year to the king, where he could not have the estate granted as consideration for that rent.

These are the cases that have been cited in support of these curious positions; and it appears there is this one answer to them all, namely, that the king's grants are void when he grants any thing illegal, either from mistake or misrepresentation, but no case can I find where a grant is void, because, in the subsequent part of it, the king makes a reservation contradictory to the substance of his grant.

This dilemma being got rid of, which seemed to have satisfied Mr. Erskine, that he had completely encircled us so that we could never get out of it; puts me in mind of a man building a prison, where he puts up the two side-walls, and leaves open the ends; or the man who hedged up the cuckoo, and let her get out at top.

It was objected, that if a corporation can be affected by an information against it, in its corporate capacity, yet this judgment does not affect it, because it is no final judgment. I must again refer the court to the argument of sir Robert Sawyer, upon this part of the case, which appears satisfactory and conclusive; he states not only a variety of cases in pages 15 and 16, where there had been quo warrantos

brought against corporations, by their corporate names, but states several cases where there have been seizures, and where there have been none; and that "where seizure is by award of the court, for a contempt in court, the court may admit the parties to affix and order restitution; so where by award of the court, on default of appearance at the king's suit, a seizure is made, which is in nature of a distress, to bring in the party by putting him out of possession of the liberty, till he appear and replevy, the court if the defendants come in time, and pray it, may deliver them possession upon replevin, and this by the new statute *de quo warranto*." He then states how it is that, by the new statute of *quo warranto* of 30 Edward I. the subject was put in a better situation than before, and shews he has a farther time given him to replevy. Then I will only read these four lines, which will make me intelligible, and confirm what was offered by Mr. Leycester, to shew that there was no act necessary farther to be done. "But this statute not limiting any time for his appearance, or to replevy, that remained as it did before upon the old statute of *quo warranto* of 18 Edward I. which refers to the practice in eyre." So that if the party did not replevin in time, the former seizure would amount to a seizure after judgment, by default, which is final.

If it amounts to a seizure after judgment, by default, and that is final, we shall at least have got over that part of the difficulty, that this being only an interlocutory judgment, cannot give the king a power to grant it away, supposing that he would have such a power if there was a final judgment of seizure.

It is objected, that there is no writ of seizure, and if this judgment went to give the king a title, there could be no occasion for a final judgment.

In the first place, it is not a final judgment when first given, but becomes so by subsequent matter; it is material in many cases, for the king to have a final judgment. If the corporation, against whom this judgment of seizure is given, resists the king, and does not give up the liberties he is entitled to by his judgment, it will become necessary for the king to have a writ of seizure issued by the court; the court then will enquire whether they are in a situation to award a writ of seizure; but if the corporation, instead of resisting that claim which the king has a right to make as soon as the judgment of seizure is given for him, think fit to give up their franchises without putting him to the trouble of suing out a writ, then there is no occasion for a writ of seizure; there is no occasion for a writ of possession, where the party gives up possession immediately.

There might be many reasons; perhaps the corporation might not be criminally punishable if, without notice, they were to exercise those franchises afterwards; there may be many reasons why, in many cases, writs of seizure are issued; but if it be true that that which is originally a judgment, in the nature of a distress, becomes an absolute one, and final by the non-appearance of the party to replevy in time; then it can never be necessary for the king to sue out a writ of seizure, if he can get the thing without such process.

What says Mr. Erskine? if the king were to *grant*, the day after the seizure, he has done wrong, because he has granted before that judgment, which was defeasible, is become absolute; the king would, I admit, do wrong, but he became fully seized of them in law, the moment they were no longer replevizable by the party; so it should seem to me that the judgment becoming final, the suspension then ceases, and the rights are absolutely gone as much as if there had been a final judgment of seizure.

It is said, the franchises of York were replevied a long time after. It is possible the king might elect, and the attorney-general consent. And I will tell your lordships why I think that election is in the king:—It appears upon this *quo warranto*, from the cases cited by sir Robert Sawyer, where on final seizures the king has granted liberties to the old corporation, that then they have been taken to be in of their old title. The cases of Winchester and Oxford are directly to that point. Sir Robert Sawyer states, that, upon a judgment against the city of Oxford, in one case a writ to the sheriff was issued, to put them into possession; from that time they remained in of their old title, that was in the 32d of Henry III.—then the liberties

liberties of Oxford were seized the 29th Edward III. and part of the liberties granted to the university, which are enjoyed by them to this day, and the residue to the town. This shews, that, even after a final judgment of seizure, it is of the king's election to restore to the antient body, or to grant the franchises away to another. If he restores to the antient body, I do not impeach the doctrine, that they shall be considered as in of their old estate; but if he has granted them to another party, that is a new grant, and they are in of a new estate. So it does not appear to me, that we are at all affected by any one of the authorities quoted—In case of a final judgment of seizure, the king's power to grant is indisputable.

We are not now arguing error upon a judgment given in the *quo warranto* cause, at the time of sir Robert Sawyer. If it became necessary to inquire into the different effects of the different judgments of seizure, Lord Holt, in the case cited 1 *Shorr*. 280, states his ideas of the different judgments which should be given against corporations: but the court will be pleased to consider, that all that doctrine of law goes only to the question, What should be the proper entry of a judgment against a corporation, which appears, and has final judgment against it upon appearance? There is not any dispute about what is the proper form of an interlocutory judgment; *that* is, a judgment of seizure. Lord Holt says, that the return which is made to the mandamus, in Smith's case, agrees that he was duly elected according to the antient customs of the city, and did not take the oaths under the act: if this act were not in the case, it would be a good return, without all question. The question is, Whether the return is not contrary to what is particularly recited in the act of parliament, which is now a public act?—and the being of the aldermen depends altogether upon the being of a corporation, Whether, by this judgment, as it is recited, we cannot construe this corporation to be dissolved? He says, "I will not give my opinion upon what would have been the effect of the true judgment: I am of opinion, that a corporation may be forfeited if the trust be broken, and the end of the institution be perverted. Then when a judgment is to seize a corporation, not dissolve it, I agree it is not so proper a judgment, for the king cannot have it. There are three sorts of liberties: a liberty granted from the crown, which doth subsist in the crown; a liberty created *de novo*, and doth exist, notwithstanding it be forfeited; and another, that cannot exist but in the persons to whom it is granted. In the first, judgment to seize or oust is proper; for then it belongs to the crown. If the other be forfeited, judgment is for a seizure, and no more; for, notwithstanding the forfeiture, it exists in the crown; for the latter judgment is proper to be given only for ouster, and that is the proper judgment. I don't think a judgment for seizure, where it is a final judgment, to be ineffectual; and the judgment for seizure *quousque*, &c. in case of non-appearance, proves it, 15 *Edw. IV. 2 Inst.* 270. "But," says he, "the reason I go upon is, that it does not appear that any judgment is given, that the franchise of being a corporation shall be seized; or else, if that were the case, he should be of opinion that the judgment was good."

It is said, that sir Robert Sawyer, in this argument to which we have occasion so often to refer, always speaks of a seizure. Now, if it were even to be held necessary that a seizure must appear upon the record, it does appear upon this; for it appears that the king had a title to the franchise by the judgment of seizure. It is not necessary the king should issue a writ of seizure, when he has the thing. Then it appears upon this record, that there was a seizure; and the court cannot but see that the king had the possession of this franchise when he granted it, and his grantee had possession of it under that grant, and continued so for four years, before there was any pretence to a restitution.

A case was cited from *Jenkins*, that a judgment of forfeiture cannot exist without appearance. That is directly contrary to 2 *Inst.* 282, and the case Mr. Leycester cited from *Bro. Abridg. quo warranto* 11. Upon looking into them, I find that they are precisely the same case: and if your lordships would only take the trouble

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to look into Brook's Abridgment, title *quo warranto* 11, you will find it directly contrary to the way in which it is stated by Jenkins, which is a very short note.

Mr. Lane having cited 9 *Co.* 96, I beg to refer the court to the same case, for the distinction which is made, and to shew this is a case where the king may have without seizure. In sir George Reynel's case, where it said that the king is not in possession till seisin or office found, the court lay this down as a general rule, that wherever a common person may enter without action, the king has it without seizure: if a common person grants, has he not a right of entry for a condition broken, and whether he may not enter immediately?—and so here may not the king have a right to take without seizure? That is a direct authority to shew that in this case it was not necessary that the king should have judgment of seizure.

Having gone through the cases in this way, and not intending to go over what Mr. Leycester has with so much industry and ability stated to the court, I shall make no further observation upon all the cases that have been stated, leaving them to their full operation, which they will have upon your lordships' mind. But I will now state one point; that even supposing the merits to be against the defendant, in all the particulars alluded to, yet it is impossible he can be ousted upon this record.

It must be taken in this case, that the title as set forth in the plea is good; and it is found for the defendant, and cannot be impeached, unless there be some matter in the replication which impeaches it; and it therefore differs both from the principle of, and reasoning in, 2 *Burr.* 2146, where the defendant had relied upon a title by prescription, and which was found against him; and where, therefore, the foundation of his plea failed. I take it I may assume this as a principle incontrovertible, that, wherever the courts mean to say that the whole of a record is to be taken together, it can only mean the whole of the record as relative to that point to which it is applied: And to construe one replication to have reference to another would be very absurd; for if the court must look at what is stated in one replication, to aid what is stated in another, as this record stood before, they must take notice of contradictory matter, because each replication contradicted the other. Then, when contradictory matter is stated upon replications on this record, it would be absurd to say you must take notice of *one* part: Which part?—it is impossible. When you say the whole record is to be taken together, it means that the declaration, the plea, the replication, and subsequent matter relative to *that issue*, are to be taken together, and that is the utmost. A verdict cures no defect in substance; after a verdict, matters of substance remain precisely in the same situation that they would have been in upon a general demurrer; and therefore, when Mr. Erskine calls upon us so loudly to know why we did not demur, I confess one reason was, that, having no sort of doubt but that this judgment would be found with us, we rather chose to go to issue upon it, knowing that every part of the record would be equally open to us as if we demurred.

I will refer your lordships to a case which proves that nothing can be taken notice of by the court in a matter where the replication is bad; 2 *Roll. Rep.* 22, Holford and Platt's case. The case is this, namely, an assize is brought, and the defendant does not traverse the seisin or disseisin alleged by the plaintiff, but pleads a recovery in bar, and the plaintiff replies and confesses, and avoids the recovery; upon which replication the defendant demurs, and it is adjudged against him. Now the demurrer is a plain confession of the seisin and disseisin upon which the court advise; and another day it was agreed by them that the demurrer was a confession of seisin and disseisin, with this difference;—if the count, plea, replication, &c. upon which the demurrer was, was good, all the matter which is contained in the count or plea is confessed; but if the count or plea is vicious, then it is otherwise; 22d *Hen.* IV. And so Fortescue, chief justice, said that it was lately agreed in the Exchequer, in the case of the *commendams*; and, this is a direct and decisive authority, that wherever the replications are bad, there nothing is admitted at all. If that is law, we have only to inquire, Whether or not it appears that these replica-

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tions are bad? for if it does, there is nothing which the court can take notice of to impeach that title which is set up for the defendant, and upon which he relies.

I shall not trouble the court again upon the first replication; because I will leave it upon the reasons before given, either that the king had no power to remove, or if he had he has done it contrary to the replication.

There are many faults to be found in the second replication. It states the power to remove according to the late patents, charters, and grants, without saying what they are: And your lordships will observe upon this replication, that it is stated that they were accordingly removed. They cannot say that it is surplusage to state it; because they have in express terms averred, that they were removed according to those patents and grants.

I take it there is another objection: It does not state any order of restitution by the court, who it is clear were in the possession of the franchises *quousque*. I conceive that ought to be done.

There is another objection: I think the proclamation would hardly be contended to be sufficient to oust persons put in by charters: they should have been ousted either by a *scire facias* or *quo warranto*.

Mr. Topping. There is no proclamation stated.

Mr. Bouver. The proclamation is immaterial to me: it is enough for my argument, that the people who are admitted to be in possession by the charter of Charles II. do not appear to be ousted under any legal process. It does not appear that the charter of James II. itself removed those officers who were in possession at the time of granting it; it is the restitution of others, without removing those in possession. I conceive, at least the king should have removed those in actual possession, and nothing is stated upon this record afterwards to shew it: it is indeed said that the old persons accepted it, but nothing is stated to shew that the other ceased to act. It appears upon the face of this grant, that there could by no means be a mayor, therefore a grant to the mayor and citizens could not be good, because it is a grant made to a corporate body, by a corporate name, where there is no head; and that is determined in several cases, particularly in *Co. Litt.* 264. a. That being so, it will be a consequence not foreseen, perhaps, and not intended by the king, that if the corporation do not replevy before the mayor is dead, or the time of his office expires, it will by consequence, for what I know, prevent them taking the grant of restitution, and it is the fault of the corporation, and their own laches. There the replication is likewise in this respect bad.

Mr. Topping said, a grant cannot be repealed by *quo warranto*; but that there must be a *scire facias* to repeal it. If that be so, the grant of Charles II. is good in the form of this proceeding, till repealed by *scire facias*; and if it could not be questioned in a writ of *quo warranto*, which is the king's writ of right for the purpose, it would be extraordinary that it should be now inquirable into *instante* upon an information in the nature of a *quo warranto* (which is still less) against an alderman of this corporation. I will not go over those cases which have been cited before. I trust the court will be of opinion, that the defendant is entitled to your lordships' judgment. But even if your lordships should be of opinion that we are wrong in every particular, still upon this record, in the form of it, it is impossible that the defendant should be ousted.

Mr. P L U M E R.

I Shall not repeat the different authorities your lordships are in possession of, although the importance of this case, and my duty to my client, call upon me to submit a few observations upon the different questions which present themselves for discussion.

The single question for your lordships' determination is, whether the charter of Charles II. is good or not; and the proposition that I mean to submit to your lordships

ships is this, that there does not appear upon this record, sufficient to warrant your lordships now to pronounce, that these letters patent are absolutely null and void.

In the first place, upon the plea, these letters patent are set forth, and the defendant's title rests upon them. It appears that every solemnity, every form necessary to give these letters patent validity, were complied with. It is found by the jury, that these letters patent were accepted; it appears that the election had been under them, and agreeably to them, for a period of above a century. Letters patent creating a corporation for the government of a large city, convey a number of valuable rights to individuals, which have been enjoyed and acted under for a great length of time. I take it to be perfectly clear, that the title of the defendant, resting on this, stands upon a matter of record, because letters patent are undoubtedly a record of the court of Chancery. Then how is the validity of this record now called in question? By an individual, having, it is true, a right, under the statute, to make use of the name of the king; but still no more than one individual against another, endeavouring now in the form of a writ of quo warranto, to destroy these letters patent.

It is contended, that your lordships ought to lean with all your weight, against the validity of these letters patent, in order, if possible, to put an end to them. The reason given is, because they were granted at an inauspicious period, and by a monarch whose acts are intitled to no favour in a court of justice; I cannot subscribe to that doctrine in a court of law. I am ready to admit, that the history of those times might be a ground for examining carefully, whether the letters patent were accepted or not, when the question was, whether they were duly and properly accepted by the persons to whom they were addressed; but when your lordships are to construe their validity, by the rules of law, I submit to your lordships, that you cannot go into the history of the times, or that there are any different rules of law for letters patent, dated in one reign or in another reign; and it would be mischievous, if you could do so, and could make the rules of law fluctuate with the politics of the times, that your lordships should adopt one rule of law for construing the charter of one king, and another for construing the charter of another.

Therefore, the principle on which the court is to decide, upon the validity of this charter, must be a principle that will be applicable to charters upon every subject, granted at every period, and involving in it all the most valuable rights a subject can enjoy; and your lordships will examine very minutely, before you will destroy a charter granted a great length of time, and under which those valuable rights have been enjoyed.

Without recurring to the date, or any political reasons upon the subject, upon what legal principle is it insisted, that your lordships are now to pronounce against the validity of these letters patent? There seem two heads of objection to them.

The one is upon the ground that they contain intrinsic evidence of their invalidity, that one part being bad vitiates the whole, and they were from the beginning void.

Another ground is that of extrinsic circumstance not appearing upon the letters patent; but either the state of another corporation, then existing in the place, or something that happened *ex post facto* to avoid these letters patent.

When I state these two questions for your lordships' consideration, I am at the same time going beyond the argument that is made upon the face of the present record; because undoubtedly the persons who have endeavoured, by these pleadings, to put an end to the charter of Charles II. have rested it upon this record, only upon one ground; namely, that they have been since avoided, not that they were void *ab origine*, for your lordships will find that the first replication is upon the ground that the power of electing aldermen ceased, from the time the aldermen were removed, and that admits, therefore, that it once did exist, otherwise it could not cease.

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The second replication is, that the charter of Charles II. ceased from the time of the acceptance of the charter of James II.

Therefore both these replications certainly, by implication, admit the validity of these letters patent at first, but aver that they have been avoided by something happening subsequent to that time. I do not mean to say that the prosecutor is not at liberty to go into any other argument, grounded upon the facts stated upon this record, by which he can get rid of these letters patent; but I submit, that the two grounds upon which they are impeached, must be considered as perfectly distinct.

In the first replication, it appears that the plea having set forth the charter in part only, but sufficient to entitle the defendant to the right he claims, the replication purports to have something not stated in the plea to superadd to it, and to make that a ground, coupled with the facts under it, for putting an end to the charter, namely, that besides the matter stated in the plea, the king had a power reserved to him by the letters patent, of removing persons in the manner stated in the replication, that he did, in fact, so remove them; and then it subjoins this conclusion, that they being so removed in fact, the power of electing any other person ceased.

The gentlemen say, the power, without considering the exercise of it, does in fact, vitiate the patent—that a charter reserving such a power to the king, even if it is never exercised, is wholly bad on that account, and is an intrinsic evidence upon the face of the patent itself, that if your lordships were to read it, you must at once pronounce it bad.

Supposing there were no other corporation in Chester than this—and supposing that the existence of the corporation, and all the powers under it, depended upon this charter, it is contended, that this clause would oblige the court to pronounce, in a collateral way, these letters patent to be void: if the court were to admit this doctrine to such an extent, your lordships must say that every charter in the kingdom, in which any one clause can be pointed out which conveys powers that are not legal, is bad in the whole; the doctrine must go to that extent, because then the king is deceived in his grant; and if he be so in any one part of it, the whole charter is to be avoided!—That is a doctrine of some little consequence to the corporations of this kingdom, because, if from the inspection of all their charters granted from the earliest period, down to the present time, you can find a single point in them which will not bear a discussion in a court of law; the consequence is to annihilate all the rights and property, and to put an end to the existence of any corporation in that place!—a doctrine of a very alarming nature!—Upon what principle is that contended? It is said it is a general position, that wherever the king is deceived in his grant, either in point of fact, or of law, the whole grant is void. Now that position in that extent is not laid down in any one of the cases upon the subject, but it is universally qualified in this manner;—it happens only when the king is deceived in the point and substance of the thing granted; for instance, if there were an exchange to the king, and it turns out that the subject had not an interest in the thing given in exchange.

Mr. Justice Buller. It is so in the case of a subject.

Mr. Plumer. If the king has been misinformed in the jet point and substance of the grant—if he has been tricked and deceived on the subject, it is said the king shall not be ousted of his rights in this sort of way, but wherever it appears that he was deceived in the subject of the thing granted, or the consideration of it, there the consequence is, that the grant is avoided; but in the same cases in which that doctrine is laid down, many instances are given in which there may be false facts stated upon the king's deed, which would not avoid it: the qualification is, that it must not only appear upon the face of the grant that he was deceived, but it must be in a weighty concern, and going to the very jet and substance of the grant; for if it be otherwise, the defect does not avoid the whole; and that is the case of the grant of a private estate, wherein the subject is not interested; for the king in granting a corporation, is only doing that in which the public is interested.

It is a prerogative of the crown that the king has a liberty of revoking his grant, but it is never contended in any case, that a third person may take advantage of it, even where the king is deceived; nor does it go the extent of enabling an individual, which is the present case, to avoid the letters patent of the king, where the king does not come in to take advantage of it. In the case of *Lord Mulgrave, 2 Freem. 17*, Sir John King made a difference where the king is mistaken in matter of fact, and in matter of law:—but there is another case in which the doctrine is fully discussed, in *Hob. 220*; “What makes a patent void, is, when the king is deceived in the real consideration that moveth and causeth this grant; for when the king makes a grant by the words *ex mero motu*, and yet expresseth a real consideration, moving his grant, which is false, and the consideration appears not to exist, which was the reason of his granting it, then he is deceived, and then he avoids it.”

In *6 Co. 56*, this distinction is taken; where it is by the suggestion of the party, that the king is deceived, there the grant shall be void, but wherever it is expressed to be *ex certa scientia & mero motu*, the grant shall be taken in the most liberal and beneficial sense, according to the king's intent and meaning, as expressed in his grant; and that doctrine is mentioned by Mr. Justice Blackstone.

Therefore I submit to your lordships, that this grant is on a subject in which the public are materially interested; namely, for the purposes of the government of the realm, is expressed in the manner I have stated, and in which the party obtaining it, has not deceived the king, for it is no part of the consideration upon which it was given, because the consideration is stated to be for past services, and the good government of the city, and that therefore upon the principles applicable to the king's grant, this clause of reservation, even if it were void, would not avoid the grant *in toto*.

There is another principle applicable to the construction of the king's grant, which I conceive very material in expounding this clause:—that principle is laid down in *10 Co. 67*, the rule is, where the grant may receive two constructions, and by force of one construction it may, according to the rule of law, be adjudged good, and by another it shall by law be adjudged void, then for the king's honour, and for the benefit of the subject, such construction shall be made, that the king's charter shall take effect, for it was not the king's intent to make a void grant. The way in which I apply that to the construction of this clause of reservation, is this; if it were a power to remove individuals, it would be good; if it is a power to remove all at one sweeping blow, it is bad, because it would dissolve the corporation.

Now if the construction, that it is to remove individuals, would make it good, and the other construction make it bad—upon this principle I contend, your lordships are bound to hold, that the king meant it in that sense which would make it good, and that must go to exclude every other sense of it upon the rule, that the king must have meant what is legal, and that the corporation shall not be dissolved.

It certainly must be such a removal as shall leave a sufficient number behind to elect; is it not plain the king speaks of a case with which the qualifying power is connected and makes a part of it? he shall remove *one or more*, and in such case they shall *fill up the vacancies* by election; does not that necessarily confine the exercise to a mode that should leave it possible for others to be elected? Will it not admit of that construction? and if so, I trust your lordships will, upon the principle I have stated, adopt that construction which will support it.

But supposing the clause itself could not admit of a legal construction, and that your lordships were bound to say the clause was bad, and that it might have been a ground for avoiding the letters patent, yet I submit to your lordships, that there must for that purpose have been a *scire facias*, to repeal those letters patent; for being matter of record, and the title of all persons under them therefore resting in matter of record, I conceive it to be a clear settled principle, that the party cannot be ousted of that right, nor a matter of record destroyed, but by a matter of record equally valid with itself; therefore admitting even that it might have been a ground

ground for avoiding it, that the king *might* have brought his *scire facias* to repeal those letters patent, yet it is another thing to say that it is void without that, and your lordships will find a great many cases upon this subject; for instance, where the king grants a market in a place where a former market existed, that is a ground for avoiding the former letters patent, and the cases go the length of saying the second grant is void:—but do they say that the letters patent are *of themselves* void? No, the authorities are, that there must be a *scire facias* to repeal them. That doctrine is laid down in the case of the *king v. Butler*, 3 *Lev.* 220—there was a grant of a market in Chatham, to the prejudice of a former market erected in Rochester, and there all the court determined, that if it was necessary to avoid the letters patent, the proper way of doing it was by a *scire facias*.

Your lordships will observe in *Dyer*, 198, there are many cases put; one is of a park keeper, to repeal a subsequent patent by which he had been turned out, and there it was necessary to have a *scire facias* to repeal it, although it was decided that the second letters patent were void; and in all those cases it was held, that there must be a *scire facias* to repeal and put an end to the record: a distinction is taken where the *scire facias* issues out of the court of chancery, and there the letters patent are a sufficient ground to warrant it, but in other courts there must be an office found, because a *scire facias* being a judicial writ, must be grounded upon some matter of record.

I will not trouble your lordships with citing the many authorities I have upon this subject; I conceive your lordships will find this general proposition laid down, that the king's letters patent being matter of record, must, in order to be avoided, even in the case of a private office or grant of any corporate right, be avoided in that way.

Mr. Justice *Buller*. Have you any case that goes that length, where the objection appeared upon the face of the patent? The existence of another market did not appear upon the grant of the second.

Mr. *Plumer*. There are two grounds upon which a patent may be avoided, either matter of fact, or matter of law; but in both cases a *scire facias* is necessary.

Mr. Justice *Buller*. Have you any case which goes to that, where it is merely a matter of law appearing upon the face of the patent?

Mr. *Plumer*. I do not know but that there may be some such cases.

I submit, that in the first place, your lordships may put a construction upon this clause, which will not make it void, and that the court is bound to do that.

In the next place, that there ought to have been a *scire facias* or record of some kind, to avoid these letters patent, and that your lordships will not pronounce them to be void, and much less so at the instance of a private individual. Upon this part of the case, if the replication which introduces it be in itself on any account bad, there is an end of every fact stated in that replication, if it were otherwise. If facts may be picked out of a replication which is bad in law, and be applied to any other replication, then it would follow, that a party might in a replication have an opportunity of making use of all the facts admitted upon that replication, and then the party might either demur to the law, or traverse the fact. Suppose a man states that he is seized in fee, by virtue of which he has a right of common, and the party pleads; first, that he is not seized in fee; secondly, that by virtue of that estate he has no right of common. In one plea he admits the seisin, in the other the right of common; and if you judge upon the whole record, then it would follow he has admitted himself out of court; therefore it is impossible that your lordships can permit that: you may cut the record in two, and take all that applies to one head of defence, and consider that *per se*; but you are never to adapt that to any other part of the record not connected with it, for if so, it would be best for a party to state a replication bad, because then by demurring to the law, he could get facts admitted which he might make use of upon the other part of the replication.

I submit, that all that replication, and every fact stated in it, falls to the ground, and that it shall not operate to my prejudice. They have attacked the letters patent upon a ground, and in a manner, which is substantially bad, and then your lordships will not look at any of the facts there, for they are put an end to the moment you pronounce that replication bad: that it is bad, I conceive, there can be no doubt, for it goes to add to the letters patent that are stated upon the plea. The manner in which it attempts to destroy the letters patent, is this; it says the king had a power to remove one or more of the select body, and that there should be in such cases, a power to supply the vacancies, agreeable to the letters patent before set forth.

In the first place, this clause comes subsequent to the stating the mode of electing aldermen by the select body; there may be different modes of electing—there may be more than one, and these may come prior to the mode of electing stated in the plea.—Suppose this clause was in the beginning of the patent in the manner herein before set forth, or that it was in any part of the patent, prior to the mode of electing aldermen set forth in the plea, then this would not shew your lordships the mode of election to supply vacancies. There are two points that they must state; first, that all the then existing body were removed; and, secondly, that the power of electing any successors was annihilated. They state nothing here but the fact of their being removed; they do not set forth what the power of electing successors in such case was to be, in order to shew that it necessarily followed from removing all that the power of electing any body else was annihilated.

How are successors to be elected in the letters patent? it says—"In the manner before stated." Now how does that appear to be a power of election in the select body?—They should have averred, that the only power given by the letters patent to elect aldermen and so on, was in the select body, and that by the destruction of that integral part, the power ceased; but it does not follow that the power of electing successors might not be in the king, in the freemen at large, or in any body else besides the select body, consistent with every fact stated in this replication.—So much for the first replication, which has attempted to destroy the letters patent upon this ground.

The other ground for destroying them is in this way; it states them to be a corporation under other charters—it states the judgment—it states the order in council of October 1688, and the charter of restitution; and then it concludes as a conclusion of law, that these letters patent ceased from and after the time of accepting the letters patent of James II.

Your lordships have heard a great deal of argument upon the question, whether in any case a corporation can be dissolved. That appears rather a matter of speculation, because it does not appear necessary for us to go into that doctrine upon the present occasion; the question is, not that abstract universal proposition, whether in any possible case by a final judgment of ouster, a corporation can be dissolved; if that were the question, I should only take the liberty of saying that the possibility of a corporation being dissolved, was, I believe, never questioned, except at one particular period of time, when the abuse of that power induced the public to draw into question the validity of it; but excepting at that one period, I believe throughout the law books it will never be found, that the right of this court to destroy a corporation by a judgment of ouster, where it has forfeited its franchise by a misuser, was ever questioned before or since; I mean in that single case at the time when the London quo warranto case was argued, for that is the very first time there is to be found any trace in any law book, that that doctrine was ever questioned, and when it was questioned, there was not a single case quoted to support it, not a *dictum*, but it was merely supported on the head of general reasoning, on the nature of a corporation: in answer to which I shall only refer your lordships (discussing that subject as an abstract proposition upon general principles) to the arguments that were adduced in answer to them upon that occasion; there were authorities quoted on the other side, and the determination of the court was that way,

way, and since that time it has been taken upon many occasions to be a settled rule of law: I state that, upon the authority of a late learned judge, who in his commentaries, speaking of the different modes by which a corporation can be dissolved, mentions this as one, that it may be put an end to by forfeiture, for the misuse of its franchises, 1 *Blackstone*, 486—"A corporation may be dissolved by forfeiture of its charter, through negligence or abuse of its franchises, in which case the law judges, that the body politic has broken the conditions upon which it was incorporated, and thereupon the incorporation is void, and the regular course is to bring a writ of quo warranto to enquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings."

This is a great authority upon this subject. He states it without doubt to be the settled law of the land, that a corporation may be forfeited through negligence or abuse of its franchises. L. C. B. *Comyns* states it as a settled law, that this is one of the modes by which a corporation may be dissolved. That doctrine is laid down in 3d vol. of the *Digest*, 415.

Your lordships are already in possession of the authority of Lord Holt, upon the abstract proposition, that a corporation may be dissolved by forfeiture. That doctrine is clearly and distinctly stated by Lord Holt to have been established by all the court in the case of the corporation of *Colchester v. Seabor*. I believe your lordships are in possession of the opinion of the judges upon that subject; where they all state that they consider it as a settled doctrine, that a corporation may be dissolved; and it is a pretty strong circumstance in the case of the corporation of *Colchester v. Seabor*, that even the counsel who were arguing against the dissolution in that case (who were very able advocates) set out in their arguments by admitting that proposition. In the beginning of the argument of Sir Fletcher Norton upon that occasion, he admits that question.

Therefore I think I am warranted in asserting, that the doctrine that a corporation may be dissolved, was never questioned in any court of law before the case of the London quo warranto, nor since; for the only instance in which it was supposed that the ten judges had in the House of Lords given a contrary opinion, Mr. *Leycester* has answered, by shewing that the question was not put to them; and therefore I take it to be clear and settled law, at the present day, and it has been uniformly so considered, that a corporation may be forfeited. But here your lordships are not called upon to decide that general abstract question: the question your lordships have to decide is, Whether this corporation was forfeited, or whether it was suspended only, as we contend by the judgment of seizure *quousque*?

That a judgment of seizure is the proper judgment in the case of a corporation not appearing, but making a default; and that the effect of it is, if it does not annihilate the corporation, to strip it of all its franchises, I shall not go into many cases to prove, because I find that doctrine expressly admitted by Sir George Treby, in his argument in the quo warranto case. Taking notice of the solicitor general's argument (in page 28) he says, "All Mr. Solicitor's authorities for seizing, hold true, if the corporation would never appear; (therefore he admits all the authorities in a case where the corporation won't appear, which is in this case.) The general consequence follows from it, that their liberties are forfeited." A quo warranto calls upon the party to shew by what right he exercises his franchises: if you won't tell us by what right you exercise these franchises, you forfeit them: so it was if they did not come before the justices in eyre. The crown has a general visitatorial power over corporations; the crown has a right to see that corporations pursue the ends for which they were instituted: wherever they won't shew their existence, or won't come and answer complaints made against them by the king, from whom they issue, it is in the nature of a forfeiture for default, and the king must grant those powers to somebody else, who *will* exercise them for the good of the public: and that is the ground upon which it is stated, that in all cases of defaults the franchise is forfeited.

With

With respect to the argument of the impropriety of proceeding against them in their corporate name, it is in the argument in the quo warranto case, that though in some instances it would not be right to proceed against them in their corporate name, yet in other instances it would. If your lordships advert to the information as stated upon the record, you will find that it is not merely for usurping and claiming the liberty of being a corporation; but other franchises are stated: and wherever that is the case, it is admitted by Pollexfen that it is right to proceed against them in their corporate capacity. Your lordships will find a great many authorities of this sort stated, where it is right to proceed against them in this way: in page 68 there are no less than ten cases stated: and he says, "I do agree that there be cases in the crown-office of quo warrantos brought against corporations in such manner as this is brought, for usurping to be a corporation, and to claim divers other liberties: and it is probable there may be more like these; but if of any authority, they are for me, and not against me: First, for that they all being for claiming other liberties, as well as to be a corporation, and being good and sufficient as to the other liberties and privileges that the corporation claims, though insufficient for this of claiming to be a corporation, they must be proceeded upon, if the attorney pleaseth."

Then it is admitted clearly, that under such circumstances it is right to proceed against them in their corporate capacity: and what reason is there why it should not be done? It is a convenient form of proceeding against those persons who call themselves a corporation, and might once have been a corporation. But in order to try that question, Whether they are or not? it is more convenient to give them that name by which they exercise those privileges, than to proceed against them individually: but I shall not go into that question. All the precedents are so: and the court will find, in Pollexfen's argument, no less than ten authorities upon this subject stated, and the law clearly admitted, that it was right, in a case like the present, to proceed against them in their corporate capacity.

Then I conceive all the objections appearing upon the face of this judgment are done away: it was proper to proceed against them in their corporate capacity; and it was proper that there should be a judgment against them, for default of appearing.

Another objection is, That it is not stated that there was a writ of seizure, and that it is necessary in a judgment of seizure *quousque* of incorporeal rights, that there should be a writ of seizure. I take the contrary of that doctrine to be laid down by Lord Chief Justice Holt, in a case in 1 *Show.* 275: he says, there needs no writ of execution; for, in *quare impedit*, if judgment be against the incumbent, the patron presents without any more ado. The cases, cited to shew that in some instances there were writs of seizure, prove nothing upon the present subject; for they were, as your lordships will see, all cases not merely of incorporeal hereditaments; but there was something from whence a profit arose.

Mr. Justice Buller. Have you looked into them?

Mr. Plumer. Yes. In 1 *Show.* 275, that distinction is mentioned: and that is certainly the reason, that where there are mixed franchises, some of which are productive of profit and advantage, the sheriff is to seize them, and answer them in the Exchequer to the king: but that is not the case where it is a mere incorporeal hereditament. This distinction also is taken, and an instance mentioned, in the case of a leet, which is in *Rassell's Entries*, 540: it appears, that by the award the leet was presently in the king's hands, without any writ at all; and there the judgment of seizure is, *capitur in manus domini regis in misericordia*: it states, that afterwards *H.* and *I.* come and petition to have the leet restored to them, and offer ten shillings. From thence it appears that the king had it, for they desire to have it back from the king, and the entry upon the record is merely that it should be taken into the hands of the king; and their desiring to have it back again shews us, that in an incorporeal hereditament the judgment is merely a judgment of seizure, followed up by no other judgment. A mere incorporeal hereditament is an imaginary thing, which by judgment alone is vested in the crown; and in this case the mode of proceeding is similar to the antient mode by *scire facias*, to shew by what authority

ity they exercise certain rights : if the party make a default, and does not appear, the king seizes it at once ; and so it is stated, and there are many cases to that point.

I will refer your lordships generally to some cases upon that subject : in *Dyer*, 197 and 198, there are a variety of instances stated of *scire facias*, to repeal letters patent, where the party made default, and where in consequence there was a seizure by the king : all of them stated there, are upon default ; therefore I take it to be perfectly clear, that there is no objection to this judgment as stated upon this record ; that it was properly commenced against the corporation, and properly followed in the case of their default by a seizure of all the franchises stated in that information. If it was right at the time it was pronounced—if it has never been reversed since, by the court that pronounced that judgment—the only question remaining will be, Whether that judgment has been done away by any thing that is stated upon this record ? Now what is there stated upon this second replication, which is to do away the effect of this judgment ?

In the first place, it is stated that it appears there was, before and at the time of the judgment, a subsisting corporation. Be it so. But it is not stated that it was so after the judgment ; and if the effect of the judgment of seizure was to put an end to them, though it might not be the *immediate* effect, yet if it arose from their not appearing afterwards, they ceased to be a corporation in consequence of that judgment : but upon the authorities I have stated, it appears manifestly, that they did so, and that that is the legal effect of such a judgment as this. Then how can they get rid of this judgment ? how avoid it ? why by the charter of pardon. But this judgment was good at the time, and followed by the letters patent of Charles II. and if the old corporation was destroyed by it, and if the franchises were seized rightly by the king, then the king being in possession of them, I take it to be perfectly clear, that the king had a right to grant them by the charter of Charles II.

If the charter was good (and this replication seems to admit it was) has it been avoided by any matter subsequent ?—I take it to be clear, that the crown cannot grant a pardon to have a retrospective operation. In the next place, a pardon can never affect the civil rights of any individual, all that the king has a right to do, is to pardon the consequences of a judgment that had not yet been carried into execution ; but it is clearly settled, that wherever, subsequent to the judgment, rights have been vested in any individual, the king cannot divest them, nor grant a pardon.

This is a judgment partly of a civil nature ; a pardon as applied to such a subject, is not a case in which the king has a power to affect that judgment ; but besides that, here were, subsequent to the judgment, rights vested in third persons, the charter was accepted, and all the rights vested in consequence of it. Upon that doctrine, which I conceive to be clearly established in a variety of cases, I shall only refer your lordships generally to 2 *Hawk.* 392, where it is laid down how far a pardon may be of force against the private interest of the subject ; he says, “ I take it to be a settled rule, that the king cannot by any dispensation release, pardon or grant whatsoever, bar any right, or any legal interest, benefit, or advantage whatever, before vested in the subject ; and upon this ground it seems clear, that the king can no way bar any action on a statute by the party aggrieved, nor even a popular action by a common informer, if commenced before his pardon or release, and that he cannot discharge a recognizance for the peace before it is forfeited.” Then it mentions the familiar instance which your lordships know, that the king cannot pardon in the case of an appeal, because a private person is interested in it. The king cannot pardon in any proceedings in the ecclesiastical courts where costs have been incurred, so as to deprive the party of his civil rights : in short, many cases are put establishing this principle, that in no one case the king divest by his pardon what is vested in the subject. Then all the effect of this pardon must be *prospective* ; if he had granted away, his pardon could not operate to deprive those who were in possession upon record, by letters patent properly granted ; he could not disfranchise them without a surrender of their rights ; he could

could not by one sweeping charter of pardon, annihilate all the rights properly vested in different individuals.

Therefore I submit to your lordships, that this charter of pardon and restitution, if it is clear that in the interim there had been rights vested, could not operate to divest them.

Upon another ground, I submit to your lordships, that the charter could not operate to destroy a legal judgment in this court, in a quo warranto; but that it ought to have been followed up by the party coming into this court, and desiring the court to put an end to the judgment it had pronounced.

Upon these grounds I submit to your lordships, that under this second head of objection to the letters patent of Charles II. namely, that there was a subsequent charter of James II. the effect of it cannot be to destroy this corporation.

One observation your lordships will permit me to make upon another point: One of the gentlemen argued that the corporation created by Charles II. were the same persons as the old corporation. In that he did not agree with the other gentlemen who argued against that position, because seven persons were excepted.

Upon what part of this record does it appear that those seven persons were part of the old corporation? There is nothing more than that A, B, C, D, are excepted out of the charter. Well, who are they? how does it necessarily destroy the argument, then, that it might be accepted by all the old corporation, because those seven persons were excepted? If that is a material fact, it ought to have been averred upon the record, that those seven persons were members of the old corporation at the time they were excepted, or at the time they were restored. If it might be granted to, and accepted by, the old corporation, I am at liberty to consider it as accepted by the old corporation, inasmuch as the only argument urged to the contrary, namely, that those persons were excepted out of it, is done away by this—that the record does not state that they were members of that old corporation; and consequently it is consistent that the old corporation, if they existed to any effect, might come in and accept under the charter of Charles II. Yet, if afterwards the individual members of it accepted this new charter, though, upon the face of it, it appears to be a new charter, your lordships know that it has been decided that it may operate as a charter of confirmation—as a charter to reanimate an old corporation; and in that way it might give vitality and existence to the old corporation, being accepted by them, if it had existence at all in that way. And if there was a corporation existing (as in the case of the corporation of Colchester) your lordships know many instances were stated, that though it purports to be a new grant, it should operate in that way.

So that I may use the charter of Charles II. as applied to the old corporation; and then they have a power to elect in the mode prescribed by the charter of Charles II. If that charter was good at the time it was granted, certainly the charter of James II. could not operate to destroy it afterwards.

One point has been a good deal pressed, which I think my learned friends who preceded me have not adverted to; namely, that if one *material* issue is found for the prosecutor, he is entitled to judgment; and a case was cited from *Burr*. The answer to that is, "*material*" must mean what goes to affect the title you have set up, and that is the argument of Lord Mansfield—"you have set up a title by prescription, which has fallen to the ground."

Mr. Justice Buller. If the replication is right, the issue upon that must be right; that follows.

Mr. Plumer. It appears to me, that this mode of proceeding, where there is a forfeiture upon default, is very analogous to the familiar instance of proceedings in the court of Exchequer, by information for a forfeiture. Your lordships know, that where there is an information for a forfeiture, the mode of proceeding is, the goods seized are returned into the court of the Exchequer, and if the party does not make an appearance, and claim and insist upon his right to them, they are forfeited.

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That is analogous to the case here of an information in quo warranto; if the party does not come in and claim his rights, they are forfeited.

Adjourned.

June 23, 1787.

[The court intimated, that they were satisfied as to the formality of the pleadings, but that it appeared to them, that king James had exceeded the power reserved in the charter of Charles II. by the amoval of the whole corporation.]

Mr. M A N L E Y.

I Understand myself to be relieved from the necessity of troubling the court upon the first point, as to the power of amoval: if that is so, I shall take up the second, as to the judgment.

I shall be very short, because the magnitude of this question is such, that it is difficult to cite any cases which have not already been cited; I mean, however, to argue the second point upon the judgment *quousque*.

It cannot be doubted but that a corporation may be forfeited, and I think there can be no doubt but that an information will lie as against the corporation itself. I think I might rest that upon several authorities which have been stated, namely, that of lord Holt, in Smith's case, in the quo warranto in the case of the city of London, and in *Colchester v. Seaber*, that doctrine was recognized by Mr. Justice Yates.

But a question fell from the court:—Supposing an information would lie against a corporation, whether *this sort* of information would lie against a corporation? It strikes me, that this is really and truly the only proper information which could be filed against a corporation itself.

The gentlemen have contended on the other side, that the information ought to be filed against individuals, to shew by what authority they claim to be a corporation; that, it seems to me, would bring it precisely within all those cases where the court have held that such an information goes to the franchises belonging to the corporation, and not to the corporation itself. And as to the argument of Mr. Erskine, the information states, "You claim to be a corporation without any royal grant," it seemed at first view, as if that was blowing hot and cold. At the time of filing that information, the court must presume there had been a forfeiture, but the forfeiture is not complete till that information, and the process on it, has been completely gone through. It strikes me, as if at the time the information was filed, they had no charter by which they were intitled to be a corporation; but yet it was necessary to use that mode. I shall not repeat to your lordships what is stated in 2 *Inst.* 282, because it must be within the recollection of the court; but I will take the liberty of stating a case which Mr. Leycester did refer to, but of which I have rather a fuller note than his. I am now coming to the judgment *quousque*, *Bro. tit. quo warranto* 34, page 186, *pl.* 11.—It is a quo warranto by the king, against A. B. to shew by what authority he claims a market in fee. The writ was returnable into the King's-bench in Easter term, and the defendant made default; and at the return of the *venire facias* he made default, and a further default at the octave of Trinity, which is the next term; and before all the justices, the question was, whether he should forfeit his market or not? Tremaine says he shall forfeit his market; for the statute says, that if the defendant does not come, the franchises shall be seized into the hands of the king, in the nature of distress, and if the party that ought to replevy the franchises, does not come while the eyre sits in that county, he shall forfeit his franchise in perpetuity, and so in all the term that

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the *venire facias* is returnable, he may come and replevy his franchises, but he cannot replevy afterwards.

Mr. Justice *Grose*. Have you had the curiosity to see who were the judges, and and who were the counsel at that time? because I remember the passage perfectly well, and it is material to know what was said at the bar, and what was said by the court.

Mr. *Leycester*. All I cited to the court, and which I took from the year book, were the decisions of the court, the opinions of the judges: I think they are all so stated.

Mr. *Manley*. Under title *extinguishment*, pl. 32, the very case is again reported in *Brook*. I think it pretty clear *Brook* would not have reported it a second time, unless it was law. When a franchise is seized into the king's hands, it is extinct, for if I have a fair or a market, and I grant it to the king, he takes it by way of extinguishment. In 17 *Vin. Abr.* 163, it is said, liberties which the king would have himself throughout England, if not granted to, or prescribed for, by a common person, are merged in the crown: if a common person that had them by grant or prescription, commits a forfeiture of them, or they come otherwise to the king, and the king has them by his prerogative, they cannot afterwards be granted but by a new creation, as waives, strays, wrecks, &c.

Now if the case be law which is cited in *Brook*, and if that be law which is cited in *Coke Littleton*, namely, that if the party does not come within the second term, after the *venire facias*, he shall be dispossessed of his franchise (whether that should operate as a final judgment or not) I submit to your lordships, that there ought to have been some process to have got rid of that judgment before any grant from the crown could operate, for I take it, the king cannot grant that to another which is already granted, and though he has a title, those claiming under him must make out a title before that grant shall operate: 2 *Hawk. Pleas of the Crown*, was cited by Mr. *Plumer*: it is there said, that the king cannot by any dispensation, release, pardon, or grant whatever, bar any right whether of entry or action, or any legal interest, benefit or advantage whatever vested in the subject; and that I presume, supposes that the king had no right to grant, but then I submit that there ought to have been a *scire facias* to reverse the grant of king Charles: supposing the judgment does not operate as a final judgment, for it is said in 2 *Inst.* 573, some have holden that at the common law, he that was in possession of land, &c. by judgment, as in the case of an *ouster les mains*, *livery*, or *amoveas manus*; no re-seizure could be made for the king without a *scire facias*, and therein to avoid the former record by matter of as high nature. The like doctrine is recognized in several other authorities, that where there is a judgment, it shall not be reversed by the king, but by some ordinary process of the court: that has never been done in this case, and therefore, supposing the original judgment is not a final judgment, the letters patent still remain good as to this purpose: there are several other cases as to *scire facias*—*Bro. scire facias*, pl. 227: *scire facias* lies upon offices found for the king, and against patentees of the king, and against the occupiers of land; that against patentees of the king, seems to me to be a direct authority in point, that it was necessary for the crown to have done something to get rid of that which the crown had already granted, in order to let in any thing else subsequent to the grant.

I should have cited upon the first point (namely, as to the information) what was the opinion of Mr. Justice *Blackstone* upon these informations: he says in the 3d vol. of his *Commentaries*, 264, "During the violent proceedings that took place at the latter end of the reign of Charles II. it was, among other things, thought expedient to new model most of the corporation towns in the kingdom, for which purpose, many of those bodies were persuaded to surrender their charters, and informations, in the nature of *quo warranto*, were brought against others, upon a supposed, or frequently a real, forfeiture of their franchises, by neglect or abuse of them;

them; and the consequence was, that the liberties of most of them were seized into the hands of the king, who granted them fresh charters, with such alterations as were thought expedient, and during that state of anarchy, the crown named all their magistrates. This exertion of power, though perhaps in *summo jure*, it was for the most part strictly legal, &c."

That shews plainly what the opinion of Mr. Justice Blackstone was at that time, namely, though the measure perhaps was not prudent or wise, yet that such an information might be filed as against a corporation.

But it has been said, that in this case, there has been no writ of seizure. Now in the first place, on looking into this information, there is nothing stated upon the face of it which the crown could seize into its hands; there is nothing which could possibly yield a profit. A corporation itself is something which is invisible, an incorporeal hereditament, as Mr. Justice Blackstone says, which seems to me to go the whole length of shewing that a writ of seizure cannot be necessary to take that which cannot be touched; but there seem to me to be authorities to shew, that in such cases, writs of seizure are not necessary upon the judgments. Serjeant Pemberton in his argument, in Smith's case, says, "Besides, there never was any execution of this judgment: the judgment is, that it shall be seized, and it never was." Lord Holt's answer is, "There needs no execution, for in *quare impedit*, if judgment be against the incumbent, the patron presents without any more ado; and then, if the judgment did not seize the corporation into the king's hands, what need of the act of parliament?" which shews, that they drew a distinction between cases, where that which was stated upon the record was an invisible body, and could not possibly yield any profit, and where that which was stated upon the record would yield a profit; for it is said, there are sometimes writs of seizure where the things taken into the king's hands are of profit, which shews the reason of it, but there is nothing upon this judgment which the crown could seize into its hands which yielded any profit, and therefore in this case, no writ of seizure was necessary to be taken out. I have abundance of cases, but most of them have been cited by the other gentlemen, therefore I will not take up the time of the court by repeating them.

The second replication, after stating the judgment by default and seizure, and king James's order for restoring the mayor and citizens, the charter of restoration, the judgment, &c. &c. [*Reading the second replication.*]

Now it seems to me, as if there was a clear objection to this replication, because it directs that the citizens shall assemble together for the purpose of making elections, and doing all other requisites in the usual manner. Now the only title that is stated, even upon the plea, is that of an alderman; and as it does not any where appear what was the usual manner of electing under the old charter, there does not seem to be that certainty which is necessary; they ought to have stated what the usual manner meant.

Mr. Justice Buller. You are speaking of the charter of restitution.

Mr. Manley. It says they shall assemble for the purpose of election in the usual manner, but it does not state what that was.

Mr. Justice Grose. That is stated in the former part of the replication.

Mr. Manley. As it now stands, it might be according to the charter of Charles, if it meant according to the fact, it meant according to that charter.

As to the objection which was taken to the order of amoval in this replication, I have one authority in 2 *Saunders*, 293, in pleading an award that the plaintiff shall be satisfied, and paid by the defendant the money due and payable to him *pro officio*, and averred to what sum it amounted, and that the defendant had paid it, it will not make the award good which was before void for the uncertainty of it; that seems a case directly in point as to the amoval, which was stated merely "according to the power reserved in the late charter," &c. not stating what the power was, which is the objection to the second replication.

If I understand the court right as to the first replication, I have some authorities that might go to shew the replication was bad, but I understand the court is with us, therefore I will not give them any trouble upon it.

Mr. *Erskine*. I do not know whether I perfectly understand the court with respect to the second replication, whether the order there stated is to be rejected as surplusage only.

Mr. Justice *Buller*. The replication must stand exactly as if it had stopped with setting out the judgment *quousque*.

Mr. *Erskine*. Unquestionably the court is not bound to confine its judgment to the particular reasons upon which it is moved at the bar, because the court may have reasons independent of those which are moved from the bar, and therefore what I am now doing, is to endeavour to remove the difficulty which occurred to one of your lordships, who are unquestionably bound, if a difficulty occurs that is not suggested at the bar, to state it, because that difficulty must be satisfied.

I apprehend there is no occasion at all to reject the restoring charter, and that it may be extremely material to my client, that your lordships should not reject it. I take an information in quo warranto to be of this sort—

The king by his prerogative calls upon the subject to shew by what authority he claims to exercise a franchise which can only proceed from him. The subject, in answer to the king's information, must shew his title to that which the information charges to be an usurpation upon the crown; and this defendant, by his plea, pleads a charter of Charles II. and an election of himself, an alderman, under that charter. Now I apprehend what it is necessary for the crown to do by its replication is, not to make any title in the crown, but to avoid that title which is pleaded by the defendant; and I apprehend the defendant is bound by the title he has pleaded; and though it should appear by the record that there might be another mode of electing aldermen under the charter of Charles II. or any other charter, yet that this defendant must be ousted, and there must be judgment against him: if it should appear to your lordships upon the whole of the record that the defendant has not substantiated, in point of fact, the title he has pleaded; that is to say, if it appear by the crown's replication (and the crown may reply as many matters as it thinks fit) that the defendant's title is void, there must be judgment against him.

He states the charter of Charles II. and the mode of electing aldermen under that charter, not only upon death, but upon removal; and he states it to be this, that if any alderman shall die, or be removed (not be removed by quo warranto, but any how removed, so applicable of course to this order, supposing it to be a good order) then, immediately after the death or removal of such alderman, it might be lawful to elect new aldermen, &c. He then goes on to state, that, upon the death of a person of the name of Attle, he was elected, by the mayor, aldermen, and common-council: therefore I apprehend it is absolutely necessary that it should appear to your lordships upon the record, that, upon the day mentioned, namely, the first day of March, in the 22d year of the king, as the election in fact is found, such an election can be a legal election; because, if there could be no election such as he sets forth by the aldermen and common-council in Chester, or if the crown avoids that title so pleaded by its replication, there must be a judgment against him: and if your lordships can say, that upon the whole record the crown is entitled to judgment, even although the replication should be bad, yet, if it appears that the defendant has not that title upon the whole record which he sets forth, namely, that there could be no legal election of an alderman upon the 2d of March, in the 22d year of the reign of the present king, under the charter of Charles II. by the aldermen and common-council assembled, who elected the defendant, the crown is entitled to judgment, notwithstanding the badness of the pleadings. It seems to me, that that case, which was mentioned by Mr. Wood, of my Lord *Portchester v. Petrie*, goes a great way to establish that point.

If your lordships should be of opinion that the *quousque* judgment, though it did not work an entire dissolution of this corporation, yet created and caused such a suspension

suspension as enabled the king to grant *pro tempore*, and during the time of that suspension to create another body with new powers; then the aid of the restoring charter will be necessary. But if the *quousque* judgment is so valid as that the charter of Charles II. never could have a legal commencement, perhaps I might have no objection to the court's striking out all the rest of the replication, and considering the order of King James, &c. as surplusage.

It is laid down, and cannot be disputed, that surplusage can never prejudice any pleading.

But the question will then be, Whether if it is struck out it carries any thing away along with it? or whether the restoring charter is not a subsequent proposition, totally independent of that order of removal so struck out.

If the restoring charter had been stated upon this record as granted in consequence of that order, it might be said, if you strike out the order for removing the aldermen and common-council, under the charter of Charles II. it carries along with it the destruction of the restoring charter: Whereas James II. could have granted a restoring charter, setting up the old corporation, without exercising the reserved power of the charter of Charles II. If there had been no power of removal reserved to the crown under the charter of Charles II.—nay, if the corporation under that charter, created in consequence of the suspension of the old corporation, had been at the time of the restoring charter an existing corporation in law, as well as in fact; yet I insist upon it, that it was competent for the king by his restoring charter to set up again the old corporation, and that that stands well pleaded; and we shall totally avoid and destroy the title stated by the defendant in the plea, if that order of removal was out of the question. What is the title the defendant pleads? He pleads a charter of Charles II. and an election of him, upon a given day, in a given year, and in a given mode; which mode is as pointed out in the charter of Charles II. Then we reply this judgment *quousque*. I should not be afraid, perhaps, to stop there. But if your lordships should be of opinion that the judgment *quousque* does not operate as a dissolution of the old corporation, yet if, as my friends have argued, the king had power of creating legally a new corporation, by this charter of Charles II. then this question will arise—If the king, during a suspension of the ancient corporation, grants a new corporation, will not the restoring charter, giving the old corporation all its ancient privileges, operate as a destruction *de facto* to the intermediate corporation? Then if it does, it is a most material matter for my client to insist upon that the rejecting the order as surplusage (though it be imperfectly pleaded, as referring to the letters patent and charters, which are not set out, and cannot be collected from other parts of the pleadings) does not carry along with it the destruction of the other. They are distant and independent sentences; for it is distinctly stated, that the king granted his restoring charter, &c. which put them exactly in the same state as if sir Robert Sawyer had never exhibited his information against them.

The defendant's title is avoided certainly, if the charter of Charles II. never existed, because he pleads an election under that charter; it is void if the charter of Charles II. did once exist between the time of the *quousque* judgment and the restoring charter, because he pleads an election under the charter of Charles II. subsequent to the restoring charter, when that intermediate charter, if it once existed, was at an end.

It has never happened to me since I have been at the bar, to hear so many long, or so many able arguments, upon any one subject, nor where there has been such a long and patient attention from the court; and I have no manner of doubt but that we shall receive a well-considered judgment. I know very well, and it is the most natural thing for people to imagine, that the court fancy, upon this occasion, that if we are successful it may lead to much confusion in this corporation; and though I think that your lordships would not vary your opinions upon the law, yet I do not know whether these sort of ideas may not fairly impress themselves upon the minds of the most correct and upright judges.

Mr.

Mr. Justice Buller. That is an argument that can only weigh when you are shewing cause against an information ; it cannot weigh in this stage.

Mr. Erskine. This is not a demurrer filed distinctly to different replications, pleaded by the crown, but is a motion upon the finding of the jury, that the postea may be delivered to the defendant ; and I think most emphatically upon that occasion, the court is never to doubt any thing that is not considered to be doubtful by the parties, and submitted as such ; and that it is open to us to avail ourselves of the whole record, and that the question will be, Whether your lordships do not see clearly and distinctly, upon the face of it, that the defendant's title, which he has pleaded (that of being an alderman under the charter of Charles II. elected by the aldermen and common-council) could not possibly exist, as there were not *de facto* any aldermen or common-council existing at the time, so that he could not possibly be elected by them.

If Charles II.'s reservation of the power did not extend so far as to make this order of amoval a good order of amoval, yet still it is an amoval *de facto*, and it is not stated upon the record, that they ever applied to be restored, or ever were restored ; and, therefore, upon this record it appears, that whether the king had reserved that power, whether he meant to reserve it, or could, in point of fact, exercise it ; yet he did, in fact, amove every alderman, every common-council man, and every officer of the corporation, and the issue that that order was signified is found for us. If they were elected again, under the power given by the charter, that is not rejoined, therefore it appears that there were not *de facto* any aldermen or common-council existing at the time this person claims to be chosen.

Mr. Plumer. Upon the point, Whether a charter may be good in part and bad in part, if your lordships will permit me to mention it, there is no case which I think goes stronger to shew that a charter may be bad in part and good in part, than that the College of Physicians are at this time acting under a charter which has been solemnly decided to be bad in part.

Mr. Justice Buller. Has it ever been decided to be good in part ?

Mr. Plumer. The validity of one part of the charter was solemnly argued three days in the year 1753, and in the result of that argument, they did not decide that the whole charter was bad ; but they referred the appellant to this court for his regular remedy, as they were the visitatorial court.

After it had been solemnly decided upon that occasion, that the visitatorial power given to the four persons named in that charter was not good, the College of Physicians still went on to act under that charter, and do to this very day.

Mr. Justice Buller. Where do you get that from ?

Mr. Plumer. I have not been able to find any printed case of it, except by Mr. Justice Blackstone, in the first volume of the commentaries, page 481, he mentions the circumstance that the right of visiting civil corporations is in this court only ; and that therefore the visitatorial power vested in the two chief justices, the chancellor and the chief baron, was not a good power ; that they directed in the year 1753, that point to be solemnly argued before them, and it was decided, after several days debate, that they had no jurisdiction as visitors, and they remitted the appellant, if aggrieved, to his regular remedy in the King's-bench. Dr. Schomberg was the appellant ; and since that time I find the College of Physicians have actually elected two fellows under that charter, which is the only charter they have power to elect fellows under.

It was not in the idea of any body at that time, that the invalidity of one clause in a charter, though it affected very materially the constitution, did annihilate the whole charter.

Mr. Manley. There is a case in *Plowden* 397. the king having granted, by letters patent, certain lands, he afterwards confirmed those letters patent by another grant, and used these words, *damus et concedimus* ; and the court held he could not plead them by way of grant, but that they were good as to confirmation ; and lord Coke, in his report of that case says, it is a case where, though some of the words

of the charter were void, it was held, that it was good for the residue. The court held that the charter was void as to the words *damus et concedimus*, but was good as to the confirmation.

Mr. Justice *Buller*. That was construction; the whole of the opinion was, that that was a charter of confirmation, and not a charter of grant.

[Monday, June 2, 1788.]

J U D G M E N T.

Mr. Justice A S H U R S T.

THERE is a matter stands for judgment of the king against Amery. This was an information filed against the defendant, to shew by what authority he claimed to be an alderman of the city of Chester.

[PLEADINGS STATED.]

Three questions necessarily arise; first, whether king Charles II. at the time of granting the charter, had a power of erecting a particular corporation in the city of Chester; *that* must depend on the effect of the judgment *quousque* given in Hilary term, 1683, and which clearly remained in force in February the 36th of king Charles, 1684-5, under which the defendant makes out his title. If the judgment of seizure was *legal* at the time it was given, for which there are clear authorities in all the books, it was founded on the default of the corporation; a year elapsed before the crown did any act in consequence of the act of seizure; then the crown granted a new charter. The question then is, whether, without a previous *final* judgment, such charter was legally grantable, and there is one thing clearly established in the year-book of Edward IV. namely, that when the proceedings were in the court of eyre, and the party did not come in during the eyre, the franchises were forfeited for ever; and though the judges differed as to the King's-bench, none of them denied that that is the law in the court of eyre, which clearly establishes this position, that the final judgment of seizure of the franchise as forfeited, is not essential to create a forfeiture; for if it was, such final judgment could never have been given in the court of eyre, for the corporation had a right to appear at any time during the eyre, but the power of the justices then determined, and they never could enter final judgment. If then final judgment is not essential to the forfeiture in the court of eyre, why should such final judgment be essentially necessary in the court of King's-bench? The cause of forfeiture is, the contumacy of the corporation, in not appearing at the time prefixed to them for that purpose, and that contumacy equally exists in the court of King's-bench, if the corporation do not come in and appear in due time. The information filed by Sir Robert Sawyer, called upon the mayor and citizens to shew by what authority they claimed to be a corporation; *non constat* by the information, whether there was any corporation in Chester, either by charter or prescription: the information imports the contrary; it charges the defendant to have usurped to be a corporation without any legal right. If any charter or prescription existed, it was incumbent on the defendants to have appeared, and shewed it; and by not doing so, they admit, that there is neither charter nor prescription to warrant such usurpation. All franchises may be lost by non-user or neglect, and the strongest case is, when it appears upon the record, that the parties are called upon in a court of justice, to state their right, and they neglect or refuse so to do. In the year-book of the 15th of Edward IV. it is said, that if a person outlawed obtains his charter of pardon, and sues a *scire facias* against the plaintiff, and he being summoned, does not appear, the charter shall be allowed for ever, and it shall not be allowed *salvo jure petentis*, for by common intendment, when he is summoned, and will not come, he will not pursue his writ.

writ. Again, it is said, letters patent shall be avoided, by reason of such neglect, and if the party loses his term he shall lose his franchise, and the judgment shall be that the franchise shall be seized, and enure by way of extinguishment; so in the present case, the corporation have surceased their term, and shall lose their franchise for ever. It is said, in many of the cases cited, final judgment was entered, and that the signing of such final judgment is necessary, and those instances prove it; to this it may be answered, that there is no formal adjudication that such judgment is necessary; but as there have been some contrary opinions, it might be done *ex abundanti cautela*; or it might be done to shew, that the election of the crown is to take advantage of the forfeiture; but that does not prove the absolute necessity of it in the King's-bench, when it is not so in the court of eyre. The authority of Lord Coke, in his 2d *Inst.* 282, is strong to this point.—Lord Coke says, “If before the justices in eyre the party come not, the franchise shall be seized into the king's hands *nomine districtionis*, which the party in time of that eyre must replevy, but if he does not replevy while the same eyre sit, in that case the franchises are lost and forfeited for ever; therefore, if the party on the *venire facias* come not, whilst the justices in eyre sit in that county, the franchises are lost for ever; and so it is in the King's-bench, if the party come not in upon the *venire facias* during the term, and make replevy, then the franchises are lost for ever.” There have been some doubts whether they might not come in during the next term, though the authority in Lord Coke seems to the contrary; but that is immaterial to be considered in the present case, because they never did appear in the next term, or at any time previous to the granting the charter of king Charles II.—if then the parties could not come in but during the term in which the *venire* was returnable, unless by grace of the crown, the consequence was, that if final judgment was given, it must be to shew the crown's right of election to take advantage of the forfeiture in that case, and to elect the granting a new charter; therefore the granting a new charter inconsistent with the former, will amount to a declaration on record, that the crown elects to take advantage of the forfeiture, and that is all that can be necessary where the corporation have no means of replevying. It would be needless to go through all the cases cited at the bar, in which there is great scope, but some contradiction. We think it better to leave out the cases that do not apply, and select those which have the strongest reason on their side. This is our opinion on the first point. The next question is, whether there is any defect in the charter itself which is sufficient to vitiate it. The objection taken to it, is, that the power of amotion reserved in it, as it extends to the whole body, is repugnant to the charter itself, and makes the whole void; but we are of opinion, that upon the sound construction of the charter taken altogether, no such repugnancy will occur, for the charter having provided for a new election upon every amotion, the power of amotion reserved must be understood *sub modo*, namely, so as not to destroy the whole body at once—so as to make it impossible to elect: taking that to be the construction, then the subsequent amotion of all the members at once, was arbitrary, illegal, and void. The third and last question then is, what is the effect of the subsequent charter of restoration by king James II.? We are all clearly of opinion upon that question, that it was a void charter and of no effect; for though it is competent to the crown to pardon forfeitures, it can only be done where they remain in *statu quo*, but not so as to affect any legal right vested in third persons, for king Charles II. had incorporated a new body of men, and invested them with new rights, which being done, it was not in the power of Charles II. himself, and not in the power of his successors, to defeat any interest once legally vested in such new corporation; and there cannot exist in the same place two independent corporations with similar powers; therefore we think that the charter of restitution was absolutely void, and of no effect; and this being our opinion upon this point, we think, upon the whole, that judgment ought to be entered up for the defendant.

HOUSE OF LORDS.

IN ERROR.

JUDGMENT of the COURT of KING'S-BENCH,

As entered upon record.

“ **W** Hereupon all and singular the premises being seen and fully understood by the court of our said lord the king, now here, it is considered and adjudged by the said court here, that the office, liberties, privileges, and franchises, so claimed by him, the said Thomas Amery aforesaid, be allowed and adjudged to him; and that he the said Thomas Amery be dismissed and discharged by the said court here, of and from the premises above charged upon him; and that he the said Thomas Amery recover against the said Ralph Eddowes, the relator above-named in this behalf, the sum of 2000*l.* for his costs by him laid out and expended in defending his suit in this behalf, according to the form of the statute in such case made and provided.”

Entry of judgment
for defendant.Costs—2000*l.*

CASE OF THE RELATOR.

Upon this judgment the relator brought his writ of error, and hath assigned errors as follows:

Trinity vacation,
1788.

Writ of error,

General error.

That judgment of ouster ought to have been given against the defendant.

1st Special Error.

That the court of King's-bench have in effect adjudged, *that* the said Thomas Amery was well elected into the office of an alderman of the city of Chester, under and by virtue of the letters patent of the said late king Charles II. in the said plea of the said Thomas Amery above-mentioned and set forth: whereas it appears manifestly by the record, That the said king Charles II. at the time of the supposed granting of his letters patent aforesaid, had no power or authority by law to make such grant of such tenor and effect, in as much as the *letters patent of the late king Henry VII. and Queen Elizabeth, were at the time of the supposed granting of the said letters patent of the said late king Charles II. existing charters, not repealed or annulled in anywise; nor was the corporation of mayor and citizens created and confirmed by those charters of king Henry, VII. and Queen Elizabeth extinguished, annihilated, or dissolved.*

2nd Special Error.

That the said letters patent of the said late king Charles II. under which the election of the said Thomas Amery is alledged to have been made, *were void, ab initio*, in themselves, as containing a proviso or condition contrary to the law of the land; *the power of amotion* contained therein to remove *all* the corporate officers, at the will of the crown, by the mere signification to them of an order, made in privy council, without further process, and thereby to dissolve and destroy, at the pleasure of the crown, the corporation itself thereby supposed to be made and created *being illegal and void, as contrary to the nature and effect of the grant itself.*

3rd Special Error

That it manifestly appears upon the record, that the said Tho. Amery could not be lawfully elected an alderman of the city of Chester, by the mayor, aldermen, and common-council, of the said city, as in

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his said plea alledged, by virtue of the said letters patent of the late king Charles II. inasmuch as it appears by the record, *that all the aldermen and common-council, created, elected, or acting under the said letters patent, were by virtue of the power contained in such letters patent, removed and displaced long before the time of the supposed election of the said Thomas Amery, from their respective offices of aldermen and common-council of the said city of Chester, whereby the power of electing aldermen, under the said letters patent, determined.*

4th Special Error.

That by the judgment of the said court of the said lord the king, before the king himself, the interlocutory or quousque judgment, against the mayor and citizens of the city of Chester, stated upon the record to have been given against the said mayor and citizens, *for their default in not appearing to the information filed against them, also stated upon the record, is supposed to have had the effect of dissolving and destroying the corporation of mayor and citizens existing at the time of such judgment, so as to make it competent to the crown to create a new corporation, by the said letters patent, stated in the plea of the said Thomas Amery, whereas, by the law of the land, the said interlocutory or quousque judgment, had not any such effect in law.*

5th Special Error.

That by the order of restitution, and by the charter of pardon and restoration, under the great seal of England, granted by king James II. and the acceptance thereof, stated upon the record, *the judgments quousque, &c. and its effects, were wholly done away, the charter of Charles II. determined and put an end to, and the antient constitution of the city of Chester restored.*

To these errors the defendant has rejoined generally.

The plaintiff in error humbly hopes, that the judgment of the court of King's-bench is erroneous, and will be reversed, and judgment of ouster entered against the defendant, for the following (amongst other)

R E A S O N S.

FIRST REASON.

I. Because the letters patent of the late king Charles II. stated in the defendant's plea, and under which his election to the office of an alderman of Chester is alledged to have been made, being *a grant of creation of a new corporation of mayor and citizens of Chester, for the purposes of general government within that city, were void, ab initio, the crown having, at the time of the granting thereof, no power or authority by law, to make letters patent of such tenor and effect, inasmuch as it appears upon the record, that there was, at that time, an existing corporation of mayor and citizens of Chester, under the letters patent of king Henry VII. and queen Elizabeth, invested with the government of the city, and two corporations, for same purposes of government, cannot by law exist, within one and the same place, at one and the same time.*

SECOND REASON

II. The king could not grant what he had not. By the interlocutory, or quousque judgment stated upon the record, the liberties of the corporation of mayor and citizens of Chester were adjudged to be seized into the king's hands, *until the court should further order.* No writ of seizure is stated to have issued upon this interlocutory, or quousque judgment. The king, if he had any thing by the quousque judgment *(which, without a writ of seizure issued upon it, he could not have)* had only a limited and qualified interest, viz. *a right to the custody of the corporation, then in being, and acting under the charters of Henry of Elizabeth, subject to the further order of the court.* The charter of Charles

Stamf. prerog. Reg.
77. (h.)

2d. Institute, 222.

9 Co. 96.

Sav. 70.

Vide also reports of
Trinity, 28 Geo. III.

Charles II. was therefore void—Shephard's Abridgment—Title prerogative, page 91, is express to this point—"That if the king grant more than he hath, as where he hath a custody of land, and he grants the land itself, his grant is void." "And, *Ubi eadem est ratio idem est jus*," is a maxim of the law.

III. The court of King's-bench have in effect adjudged, that the corporation of Chester, existing and acting under the charters of Henry and Elizabeth, was dissolved, and annihilated by the judgment of *quousque*, of Hil. term. 35 and 36, Charles II. for default of appearance to the information filed against them. The interlocutory, or *quousque* judgment stated, had not any such effect in law—it was merely process to compel the appearance of the corporation, by laying a foundation for the issuing of a writ of seizure, the execution of which would have given notice to the corporation of the judgment. No writ of seizure is stated upon the record to have issued, so that it does not even appear that the corporation ever had notice of the judgment *quousque*, much less that they lost the possession of any thing by it, for the judgment of itself could not affect the corporation, without a writ of seizure, and consequently there was not even a temporary suspension of its corporate functions.

IV. Because it is found by the jury, that there never was a final judgment of ouster against the corporation of mayor and citizens of Chester, created and confirmed by the charters of king Henry and queen Elizabeth, without which that corporation could not be destroyed, even supposing (which is not admitted) that such judgment could have had that effect, and consequently the charter of Charles II. had no legal origin, the object of that charter being to create a new corporation of mayor and citizens of the city of Chester, for the same purposes for which the corporation, then in being, was created. There is a plain distinction between *quousque* and final judgments in point of legal effect, which will appear by referring to the cases cited, and to the forms of the different judgments, and the writs of seizure, which severally issue upon them; and if (as may be contended from the most respectable authorities) the legal effect, even of a final judgment, would not have been, wholly, to annihilate the corporate capacity, much less can such effect be ascribed to a *quousque* judgment.

V. Because the letters patent of the late king Charles II. were either void in themselves, *ab initio*, or were avoided by matter subsequent to the granting thereof and previous to the supposed election of the defendant, under those letters patent. The power of amotion contained in the charter of Charles II. was illegal, and the charter void. The proviso was repugnant to the nature of the grant. The king was therefore deceived in law, and his grant, not being capable of taking effect according to the intention of the crown expressed in it, is on that account wholly void. A grant of matter of prerogative, if void in part, must be held to be void in toto. Supposing, however, that

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† The writ of seizure on judgment *quousque*, commands the sheriff to seize according to the form of the judgment, as in the king v. Quadryng, appendix, No. III.—See also the writs of seizure issued against the corporation of St. Ives, 36 Car. II. Roll. 49.—Oxford, Ro. 101.—Thaxted, Ro. 141.—Laughour, Ro. 218.

The writ of seizure on final judgment commands the sheriff to seize and answer to the king for the profits.—See the writs of seizure issued against the corporations of Calne, 36 Car. II. Ro. 50.—The Bermudas Company, Ro. 219.—Laughour, 1 Ja. II. Ro. 85.—Montgomery 4 Ja. II. Ro. 133.—Nottingham, ibid. Ro. 158.—Llanvillling, ibid. Ro. 165.—Winchester, ibid. Ro. 166.—Morpeth, ibid. Ro. 167.

page 521 to 530; also 532-3. Shephard's Abr. Tit. Prerogative, 91.

THIRD REASON. Skinner's Rep. 154.

Vide record, the king against the corporation of York. Easter 36 Car. II. Ro. 12.

Reports of Trinity, 28 Geo. III. p. 530.

FOURTH REASON

1 Lord Raym. 17-18 Shower, 280. Skinner, 310-4 Modern, 58, 2 Barnardiston, 390. Palmer, 491. Sir W. Jones, 166. 8 Mod. 358. Salk. 191. Vide the Record v. Corporation of Malmesbury, Mich. 36 Car. II. Rot. 135 Judgment reversed in parliament, 13th May, 2 William and Mary. Reports of Trinity term, 28 Geo. III. p. 525.

FIFTH REASON.

See Reports of Trinity term, 28 Geo. III. pa. 537, et seq. and the cases there cited,

the power of amotion, contained in the charter of Charles II. was legal, *the charter itself has in fact been determined and put an end to by the exercise of that power of amotion, by the order of amoval stated upon the record. All the electors, being removed, and there being no averment of a subsequent election of others, it follows, that from the period of their amoval, the right of electing must of necessity cease, and the defendant could not be elected in manner as he has alledged by his plea.*

SIXTH REASON.

The king v. Leigh,
4 Burr. 2143.

VI. The king is not called upon to shew a title to any franchises, because all franchises are derived from him, as their source and fountain; but the defendant is bound to make out a title against the crown to the office claimed by him, and that title must be disclosed at once by his plea, and he cannot resort to any other matter upon the record at large to sustain his title to the office, other than such as is stated by him in his plea; and if it appears, from the whole of the record, that the defendant has no title, the crown must have judgment. The title of the defendant is stated to be under a power of election contained in the charter of Charles II.—that power of election, for the reasons already offered, it is submitted, did not exist at the time of the supposed election of the defendant, *on account of the previous amotion and annihilation, near a century before, of all those in whom the power of election resided.* The charter of Charles II. was founded on the interlocutory or *quousque* judgment only, and by the orders of amoval and of restoration, by the charter of pardon and restitution, granted by king James II. under the great seal of England, and by the acceptance thereof, which stand admitted facts upon the record, *not only the judgment of seizure quousque was pardoned and released, and all the consequences and effects of that judgment, together with the charter of Charles II. itself, done away and extinguished, but the antient constitution of the city of Chester, under the charters of Henry and Elizabeth, was restored, and the mayor, and all other the antient officers of the corporation, were reinstated in, and actually resumed their respective offices, which they held at the time of the interlocutory or quousque judgment signed.* The politic and corporate capacity of the antient corporation, under the charters of Henry and Elizabeth, was in being, capable of accepting this grant of pardon and restitution of king James II. The acceptance of that charter, in all the particulars of it, is admitted upon the record; and from that time to the present, there being no contrary averment, the charters of Henry and Elizabeth must be considered as the subsisting charters of the city.

Comberbach 214,
307, and 5 Mod. 11.
where on a mandamus
to restore common-council-men, the
corporation of Chester
returned the charter
of Henry VII. as
the constitution of
the city.

Vide Record Rex. v.
Johnson, Hil. 7 Geo.
II. Rot. 25.
Reports of Trinity
term, 26 Geo. III.
page 367, and Hil.
27 Geo. III. pa. 582.

SEVEN REASON.

The king v. Leigh,
4 Burr. 2143.

VII. If any one material issue upon the record is found for the crown, the crown must have judgment against the defendant. Upon the present record, *two issues are found for the crown, viz. the 5th and 6th. The one, that the order of amotion stated upon the record, was duly signified to the several persons named in it—the other, that there was not any final judgment against the corporation.* That both these issues are material, a reference to the facts stated upon the record will prove beyond all question. The power of amotion, contained in the charter of Charles II. is to be carried into effect by an order of such nature, signified in such manner as is stated upon the record. The crown declares, by the terms of reservation of the power of amotion, that upon the signification of such an order, the parties included in it shall be, *ipso facto*, removed from their respective offices, *without further or other process.* By the order of amotion, signified as above mentioned, all those in whom the power of electing aldermen was vested, were gone and extinguished. None are averred upon the record to have been elected into their places, and consequently the defendant could

not

not be elected an alderman by a body of electors, which body was annihilated and extinguished a century previous to the date of his supposed election. The materiality of this issue seems therefore unquestionable; but that the remaining issue, found for the crown (viz.) *that there never was a final judgment of ouster against the corporation*, is a material issue, there can be no doubt. The defendant himself has admitted its importance. He felt the establishment of that fact to be essentially necessary to give validity and effect to the charter of Charles II. and therefore he averred, *that a final judgment, not of seizure merely, but of ouster, had been given against the old corporation, under the charters of Henry and Elizabeth*, by reason whereof that community and body corporate was totally dissolved and destroyed; but in the proof of this fact the defendant failed; and it now stands upon the record found by the jury, *that there never was a final judgment, and consequently, that the old corporation under the charters of Henry and Elizabeth was not dissolved or destroyed*, even upon the ground on which the defendant himself has rested it.

LASTLY. Because no instance is to be found in the history of the law of England, where a corporation has been adjudged, by a court of law, to be dissolved by a judgment of seizure quousque, upon an information in the nature of a quo warranto, for default of appearance. The court of King's-bench, in giving judgment in the present cause, relied mainly upon the report of a case, in the year-book of the 15th Edward IV. respecting a market, as an authority against the position above stated. That was a proceeding, by writ of quo warranto, and not by information, in the nature of a quo warranto.—The cases are not analagous, but supposing them to be so, the authority of the case, in the year-book of 15th Edward IV. is shaken by Mr. Justice Jenkins's report of it, in his Centuries, page 141.—The court of King's-bench decided the present question, conceiving that the judgment in the case in the 15th Edward IV. was a final judgment of seizure of the market, as being forfeited.—According to Mr. Justice Jenkins, the judgment given was of seizure only, as contra-distinguished from that of seizure, as being forfeited.—Upon an examination of the record itself, remaining in the King's-bench treasury, it appears, *that the judgment given, was of seizure quousque merely*. A writ of seizure also appears to have issued upon that judgment, and to have been executed and returned by the sheriff.—The market was not forfeited by the judgment then given, the prosecutor had not got to the extremity of process, nor was the suit determined, for by the controulment rolls of the King's-bench, it appears, that after the writ of seizure executed, process by *alias* and *pluries venire facias*, and *distringas*, was continued against the defendant, for no less a period of time than fourteen years, and the suit is determined at length by the death of the defendant, as appears by the sheriff's return, in the 2d year of Richard III.

EIGHTH REASON.
See this case at length in the appendix, No. 1.

See the difference as to the process and effect of each, 1 Sid. 86, and the cases there cited.

See appendix, No. 2.

See copy of the record and process, appendix, No. 3.

J. ADAIR.
T. ERSKINE.
GEO. WOOD.
JAMES TOPPING.

A P P E N D I X.

(No. 1.)

Year-book, Michaelmas Term, 15th Edw. IV. A. D. 1475.

Year-book.—Micha.
15th. Ed. IV. A. D.
1475.

Translation of the
case cited, by the
court, in the judg-
ment given in the
king, v. Amery.

“ The king brought his *quo warranto* against a man, to shew *quo warranto*, he claimed to have a market in C, in prejudicium, &c.
“ The writ returnable of *Easter term* last past, at which day the defendant did not appear. Upon which there issued a venire facias against the same defendant, returnable in *Trinity term*, at which time also the defendant did not appear. And now, in the Exchequer chamber, before the justices of both benches, the question was moved, whether the defendant should *forfeit* his market or not, and the statute of *quo warranto primo* was looked into upon this matter.”

(a) TREMAYLE.

“ It seems to me, that he should forfeit his market, for the statute provides, that if the defendant comes not at the return of the venire facias, then it may be done, as it might be in the eyre, and I say, that before justices in eyre, if the party, who hath the franchise, comes not, then the franchise shall be seized into the king's hands, *nomine districtionis*; and if the party, who ought to replevy the franchise, comes not still during the eyre, in such county, he ought to forfeit the franchise *for ever*, and so it happened in the eyre of Kent:—such a franchise was seized, *nomine districtionis*; and therefore, Herby, then justice in eyre, said,—“ Come the party sitting the eyre, or otherwise he has lost his franchise for ever. So here, when he had day the last term, by the venire facias, which was *the last process in such action*, and the party did not come, all this term it shall be in the king's hands; but *nevertheless the party shall have replevin of it, when he comes.*”—

(b) COLLOW.

“ I think otherwise; for oft times in our law, if a man makes default upon certain process, the plaintiff shall have his recovery; as if a man be outlawed, in a personal action, upon which the defendant purchases his charter of pardon, and has a scire facias against the party, to shew why his charter should not be allowed; if the sheriff returns the scire facias, and he comes not, the charter shall be allowed for ever, and shall not be allowed, *salvo jure petentis*; for, by common intendment, when he is summoned, and comes not, he does not mean to pursue his writ. And if the sheriff returns the writ, *non est inventus, vel nihil habet*, he shall have a *sicut alias*; and if he returns *nil habet*, or *non est inventus*, the charter shall be allowed, for *the process is determined by course of law*. So in the case here, *he has no other process after the venire facias returned*, wherefore, &c.

(c) FINCHAM.

“ To the same purpose, and that the franchise shall be forfeited for ever; for when the king sues against the defendant, *quo warranto*, &c. he takes this suit to the end, that if the defendant can shew good title for himself, he should hold his market; and, if he cannot shew good title, then the king might seize it; and, when it is seized, then no market can be held thereafter; and if the party might then have his replevin, the king would have no effect of his suit, and the party has lost his market, by his own laches, and this is not against reason, as if the king grants me certain lands by

“ letters

" letters patent, which he hath before granted by letters patent to another, and I have a *scire facias* against the first grantee, to shew, why his letters-patent should not be repealed; if he makes default at the *alias* and *pluries*, the letters-patent of the first grantee shall be made void, and annulled, by reason of his own laches. So here, because the defendant hath surceased his time, there is reason that he should lose his market.

" At the common law, before the statute of non-claim, if the tenant in a precipe, *quod reddat*, had made default, at the return of the grand cape, and did not come within forty days after, he never could wage his law, inasmuch as the land was taken into the king's hands, but the party might recover the land still, but now the statute hath taken away this. But, in the case at bar, the common law was before justices in eyre, that if he, who had such franchise, did not come before the justices, during the eyre, then the franchise should be forfeited; and now the statute is, that after the venire facias, if the defendant makes default, it shall be done as it was before the justices in eyre; therefore it behoveth, that he now forfeit his franchise by the statute.

" I think otherwise; and as to the case put by Collow, of the *scire facias*, upon a charter of pardon, I agree, that the charter shall be allowed, if he (the plaintiff in the action) does not appear at all; for otherwise his (the defendant's) body should be imprisoned for ever; if he must continue in prison, and this would be a great mischief, but it is otherwise here, for none of the parties is in such mischief; and so it would be against reason, that when a man has a title to have any thing, he should forfeit it for ever, for such a short delay; wherefore, it is reasonable, that the franchise shall be seized, and that the party may replevy, when he will sue it."

" I think otherwise; for, at the common law, before the justices in eyre, if the party was summoned, and came not during the eyre, he shall forfeit his franchise for ever; therefore, and the rather, since the statute gives the party a longer process, viz. *summons* and *venire facias*; and nevertheless he makes default, there is the greatest reason, that he should forfeit for ever.

" I think otherwise; and granted, that the law was before justices in eyre, that if the party came not sitting the eyre, he should forfeit his franchise; still I say, he ought not to forfeit it in this case; for in the same manner that he might come, sitting the eyre, to shew by what authority he claimed to have the franchise; the same form is to be observed before justices of the King's-bench, and the King's-bench, at all times, continues; and, therefore, at all times, he may come and replevy his franchise (to wit) his market; and therefore the market shall not be forfeited, but shall be seized, as Nele has said.

" If the market should not be forfeited, the king cannot have any effect of his suit, as Fincham hath said; and therefore, what shall the judgment be? viz. that the market shall be seized into the king's hands? or shall judgment be given, that the market be ousted, &c.?

" The judgment cannot be given, that the market be seized; for when it is in the king's hands, it shall not be held as a market; wherefore the judgment ought to be, that the market shall be ousted, &c.

" The judgment shall be given, that the market shall be seized, &c. and that shall enure by way of extinguishment; as if I grant

(c) CATESBY.

NELE.

LITTLETON.

NEDHAM.

BILLING.

PHILPOT. (d d)

BRIAN.

" to the king a market, which I have of his gift, this grant is good, and shall enure, by way of extinguishment; and as to what Nedham has said, that the king's-bench always continues, I agree to some intents, but not to this; for now here the King's-bench shall be taken, as for the one term, in which the *venire facias* was returned, and not otherwise.

BILLING.

" If the party has continued this market by wrong, and by no title, as by grant of the king, or other manner, then the judgment shall be given, that the market be ousted; but, if the king or his ancestors have granted the market to the defendant, and he has misused it, or not used it, the judgment shall be, that the market shall be seized, &c. for I have seen where a man (plaintiff) hath sued a writ of nuisance of his market; the judgment was given, that the defendant's market should be seized, &c. But here non constat curiæ, whether this market commenced by wrong, or by grant, wherefore there is the greater reason, for the uncertainty, that the judgment shall be given, that the market shall be seized,—Cum hoc concordant alii iudiciarii—as to the judgment to be given as Billing had said.

Quære.—If the king, being seized of a market, grants the same to me by patent, and afterwards I misuse it or abuse it, if the king shall seize it? And when he has seized it, whether it shall be a market in the king's hands or not?

BILLING,
CATESBY.

Shall the king have a *capias pro fine* in this case or not?

He shall not; for it may be, that the party hath good right to this market, and so hath done no wrong to the king; and if a tenant in a *præcipe quod reddat* makes default, upon default, so that the demandant hath judgment to recover, the tenant shall not be amerced, for still no default can be adjudged in the tenant, so here—if no wrong can be adjudged in him, who claims the market, there is no reason to grant a *capias pro fine*.—

CHOKE.

If we say the judgment is right, then a *capias* shall issue, for the judgment shall be accounted like the case of a trespass confessed, in which case there shall be a fine. " *Ideo Quære.*

N. B. By the *Chronicon Juridic.* (2d edition, London, 1739) it appears, that

- (a) Tremayle was not made a judge before the 16th July, 1488.
- (b) Collovy, 31st Jan. 1488.
- (c) Catesby, 20th Nov. 1482.
- (d. d) Fincham and Philpot do not appear ever to have been judges.

(No. 2.)

Jenkins's Centuries, page 141.—Report of the above case.

Jenkins's Centuries,
p. 141.

" A quo warranto is brought in the King's-bench, the defendant being summoned, makes default; and another default at the return of the *venire facias*; judgment shall be, that the franchise shall be seized into the King's hands; and not that it shall be forfeited; for it does not yet appear, whether there be cause of forfeiture—*No man shall finally lose his land, or his franchise upon any default, if he has never appeared.*"

By the judges of both benches.

(No.

(No. 3.)

The following case of the King against Quadryng is the *only* case in quo warranto, which, *on a recent search*, appears in the controlment rolls in the Crown-office, from Hilary, 14th Edw. IV. to Hilary 15th Edw. IV. *both inclusive*.

Translation of the controlment rolls in the Crown-office of the *pro-* Hilary 14. Ed. 4.
cess in this cause. Roll 34.

"The king to the sheriff of Lincolnshire greeting, summon by " Lincolnshire, 1st."
"good summoners William Quadryng, that he be before us in the
"octaves of St. Hilary, to shew by what warrant he claims to have Mich. 14. Edw. 4.
"a market every week on Saturday at the town of Burgh in le
"Merthe, in the county aforesaid, without the licence and will of
"us and our predecessors, kings of England (as is said) and have
"there the summoners, and this writ. Witness ourself at West-
"minster, the twenty-fourth day of November, in the fourteenth
"year of our reign.
"At which day the sheriff returned that he is summoned by, &c.
"and because the court here is not advised concerning the process
"to be thereupon farther made in this behalf, a day is therefore Hil. 14. Edw. 4.
"given as well to John West, who prosecutes for our said lord the
"king in this behalf, as to the aforesaid William Quadryng, before
"our lord the king, until in fifteen days from the day of Easter
"wheresoever, &c. in the same state as now, &c.
"At which day there is adjudged by the court a writ of *venire* East. 15. Edw. 4.
"*facias* to answer, on the octave of the Trinity, wheresoever, &c.
"Afterwards Michaelmas 20, Edw. IV. *alias venire facias*, on the Mich. 20. Edw. 4.
"octave of Hilary.
"At which day a writ of *disringas*, in fifteen days of Easter. Hil. 20. Edw. 4.
"At which day (in the 21st year) a writ of *pluries disringas*, on East. 21. Edw. 4.
"the octave of Trinity.
"At which day a writ of *pluries disringas*, on the octave of Mi- Trin. 21. Edw. 4.
"chaelmas.
"Afterwards, Michaelmas 22, Edw. IV. *pluries disringas*, on the Mich. 22. Edw. 4.
"octave of Hilary.
"At which day a writ of *pluries disringas*, on the morrow of John. Hil. 22. Edw. 4.
"Before which said morrow of John, in the first year of Richard Trin. 1. Rich. 3.
"the third now king, the plaint aforesaid remained without day, as
"appears by roll 4. of that year, therefore *venire facias* on the oc-
"tave of Michaelmas.
"At which day a new writ of *venire facias*, on the octave of Mich. 1. Rich. 3.
"Hilary.
"At which day a new writ of *venire facias*, in fifteen days of Hil. 1. Rich. 3.
"Easter.
"At which day a new writ of *venire facias*, on the morrow of East. 1. Rich. 3.
"John.
"At which day, in the second year of Richard the third, a new Trin. 2. Rich. 3.
"writ of *venire facias*, on the octave of Michaelmas.
"At which day the sheriff returned *that the said William Quad-* Mich. 2. Rich. 3.
"*ryng is dead.*"

Translation of the controlment roll in the Crown-office of the judgment in this cause.

Term. 17. Edw. 4.
Roll 18.

"Lincolnshire,
to wit,
Roll xxix.

"A plea between our lord the king and William Quadryng, to shew by what warrant he claims to have a market every week on Saturday, at the town of Burgh in le Merthe, in the county aforesaid, without the licence and will of the same king and his predecessors, kings of England (as was said) whereof there was a default against the aforesaid William Quadryng, whereupon a day is given thereupon to John West, who prosecutes, to the octave of St. Michael wheresoever, &c. to hear their judgment thereupon, &c. in the state in which now, &c.

Mich. 15. Edw. 4.

"At which day judgment is given thereupon, *that the market aforesaid be taken and seized into the hands of our lord the king quousque, &c.* And it is commanded the said sheriff of Lincolnshire, that he do not forbear, &c. but that he take and cause to be seized the market aforesaid, into the hands of our lord the king, according to the form of the judgment aforesaid, &c. And how, &c. that he make appear to our lord the king, in the octaves of Hilary wheresoever, &c. *That farther, &c.*

Hil. 15. Edw. 4.

"At which day Robert Markham, knight, sheriff, returned that by virtue of the aforesaid writ to him directed, on the thirteenth day of January, in the fifteenth year of the reign of King Edward the fourth, he took and seized the market aforesaid into the hands of our lord the king, according to the form of the aforesaid writ, Wherefore."

Translation of the entry roll, in the Treasury, in the cause of the King against Quadryng.

"Pleas before our lord the king at Westminster, of the term of the holy Trinity, in the fifteenth year of the reign of Edward the fourth, after the conquest.

"Witness, T. Billyng.

The King.

Mich. 14. Edw. 4.

"As yet of the term of the holy Trinity—the King—Roll xxix.

"Lincolnshire,
to wit,
14 Edw. 4.
Roll 34."

"Some time ago (that is to say) on the 24th day of November, in the fourteenth year of the reign of our lord the now king, by the writ of the same king, it was commanded the sheriff, that he should summon by good summoners, William Quadryng, that he might be before our lord the king in the octaves of St. Hilary then next following wheresoever, &c. to shew by what warrant he claims to have a market every week on Saturday at the town of Burgh in le Merthe, in the county aforesaid, without the licence and will of the same king and his predecessors, kings of England (as was said.) And the said sheriff at that day returned, that the aforesaid William Quadryng was summoned by John Crouner and William Carton.

Hil. 14. Edw. 4.

"And because the court here is not advised of the process to be thereof farther in this behalf made, a day is given thereupon as well to John West, who for our lord the king in this behalf prosecutes, &c. as to the aforesaid William Quadryng, before our lord the king, until in fifteen days of Easter then next following wheresoever, &c. in the same state as now, &c.

Eas. 15. Edw. 4.

"In which fifteen days of Easter, before our lord the king at Westminster, the aforesaid William Quadryng, although on the fourth day of pleading, being solemnly called to appear, *doth not come.*

"Whereupon

" Whereupon it is commanded the sheriff that he do not forbear,
 " &c. but that he *cause to come* before our lord the king, in the octaves
 " of the Holy Trinity then next following wheresoever, &c. the
 " aforesaid William Quadryng, to answer to our said lord the king,
 " by what warrant he claims to have the market aforesaid, in form
 " aforesaid mentioned, according to the form of the aforesaid writ
 " of *summons*, in form aforesaid executed, &c.

" And on that day the said sheriff returned, that the aforesaid Trin. 15. Edw. 4.
 " said William Quadryng is *attached* by John Leson and Hugh Bell.
 " At which octaves of the Holy Trinity before our lord the king at
 " Westminster, the aforesaid William Quadryng, although on the
 " fourth day of pleading solemnly called to appear, *doth not come*.

" Whereupon because the court here is not yet advised concerning
 " the judgment in this behalf to be given, day is therefore given to
 " the aforesaid John West, who prosecutes, to be before our lord the
 " king in the octaves of Saint Michael wheresoever, &c. to hear
 " their judgment thereupon, &c. in the state in which now.

" At which day before our lord the king at Westminster, cometh Mich. 15. Edw. 4.
 " the aforesaid John West, who prosecutes, &c. and prays judgment
 " to be given in this behalf, against the aforesaid William Quadryng,
 " for our lord the king, &c.

" Whereupon the premises being seen, it is considered *that the*
 " *market aforesaid be taken and seized into the hands of our lord the king*
 " *quousque*, &c. And it is commanded the sheriff of Lincolnshire,
 " that he take and cause to be seized the market aforesaid, *according*
 " *to the form of the judgment aforesaid*, into the hands of our lord the
 " king: and how, &c. that he make appear to our lord the king, in
 " the octaves of Saint Hilary wheresoever, &c. *And farther, &c.*
 " And be it known, that the writ is thereupon delivered here in
 " court to William Porter, deputy to the sheriff of the county aforesaid
 " (to wit) on the twenty-eighth day of November, in the
 " fifteenth year of the reign of our said lord the now king, to execute,
 " &c.

" At which day before our lord the king at Westminster, the 1111. 15. Edw. 4.
 " sheriff returned that by virtue of the aforesaid writ (to wit)
 " on the thirteenth day of January, in the fifteenth year of the reign
 " of the same king, he took and seized into the hands of our said
 " lord the king the market aforesaid, *according to the form of the said*
 " *writ*, Wherefore."

EXTRACTS of STATUTES and RECORDS produced by the counsel, for the plaintiff in error.

CLAUSES in sundry acts of parliament relating to the city of Chester.

" An act for the levying of fines, with proclamations of lands, within the county
 of the city of Chester."

Whereas by an act made in the parliament holden at Westminster 43 Eliz. ch. 15.
 sect. 1.
 by prorogation, in the second year of the reign of our late sovereign
 lord, of famous memory, king Edward VI. intituled, "*An Act for*
 "*fines with proclamations in the county palatine of Chester*, It " was
 D d d z " enacted,

“ enacted, that all fines which at any time hereafter should be levied
 “ or acknowledged before the high justice of the said king, or of his
 “ heirs and successors, of *his* county palatine of Chester, for the
 “ time being, or before the deputy or lieutenant justice, for the time
 “ being, of any lands, tenements, or other hereditaments, lying and
 “ being within the said county palatine of Chester, which should be
 “ openly read and proclaimed in such manner and form as in and by
 “ the said act is particularly appointed, should be of like force,
 “ strength, and effect in the law, to all intents, constructions, and
 “ purposes as fines duly levied with proclamations before the said
 “ king’s justices of the Common Pleas were.

sect. 2.

“ And forasmuch as the said act *doth not extend* to any lands, tene-
 “ ments, or other hereditaments, lying and being within the county
 “ of the *city of Chester* (the said city, with the suburbs and hamlets
 “ thereof, and all the land within the precinct and circuit of the
 “ said city, suburbs, and hamlets, *being long before by our late sovereign*
 “ *lord, of famous memory, King Henry VII. by his highness’ letters patent,*
 “ *bearing date at Chester the sixth day of April, in the one-and-twentieth*
 “ *year of his reign, divided, exempted, and in all things separated,* from
 “ the said county of Chester, and from thenceforth *made and ap-*
 “ *pointed to be a county by itself,* and in itself, distinct and separate
 “ from the said county of Chester;) so that the inhabitants within
 “ the said city, and all others, being owners of lands within the
 “ county of the said city, have no means to levy any fines, of such
 “ their said lands, in any of her highness’ courts of record.”

“ May it therefore please your most excellent majesty,” &c.

“ An act for making of the knights and burgesses within the county
 “ and city of Chester.”

34 and 35 Henry 8.
 chap. 13. sect. 1.

“ To the king our sovereign lord in most humblewise shewn unto
 “ your excellent majesty, the inhabitants of your grace’s county pa-
 “ latine of Chester, that where the said county palatine of Chester is
 “ and hath been always hitherto exempt, excluded, and separated out
 “ and from your high court of Parliament to have any knights and
 “ burgesses within the said court, by reason whereof the said inhabi-
 “ tants have hitherto sustained manifold dissensions, losses, and da-
 “ mages, as well in their lands, goods, and bodies, as in the good,
 “ civil, and politic governance and maintenance of the common-
 “ wealth of their said county. And forasmuch as the said inhabi-
 “ tants have always hitherto been bound by the acts and statutes
 “ made and ordained by your said highness and your most noble pro-
 “ genitors, by authority of the said court, as far forth as other coun-
 “ ties, cities, and boroughs have been that have had their knights
 “ and burgesses within your said court of Parliament, and yet have
 “ had neither knight ne burgess there for the said county palatine;
 “ the said inhabitants, for lack thereof, have been oftentimes touched
 “ and grieved with acts and statutes made within the said court, as
 “ well derogatory unto the most antient jurisdictions, liberties, and
 “ privileges of your said county palatine, as prejudicial unto the
 “ commonwealth, quietness, rest, and peace of your grace’s most
 “ bounden subjects inhabiting within the same.” For remedy
 “ whereof, it may please your said highness that it may be enacted,
 “ with the assent of the lords spiritual and temporal, and the com-
 “ mons in this present Parliament assembled, and by the authority of
 “ the same, That from the end of this present session, the said county
 palatine

palatine of Chester shall have two knights for the said county palatine, *and likewise two citizens to be burgeses for the city of Chester*, to be elected and chosen by process to be awarded by the chancellor of England unto the chamberlain of Chester, his lieutenant or deputy for the time being; and also like process to be made by the said chamberlain, his lieutenant or deputy to the sheriff of the said county of Chester; and the same election to be made under like manner and form to all intents, constructions, and purposes as is used within the county palatine of Lancaster, or any other county and city within this realm of England; which said knights and burgeses, and every of them so elected and chosen, shall be returned by the said sheriff into the chancery of England, in due form and upon like pains as it is ordained that the sheriff or sheriffs of any other county within this realm should make their return in like case; and which said knights and burgeses, and every of them so elected and returned, shall be knights and burgeses of the court of Parliament, and have like voice and authority, to all intents and purposes, as any other the knights and burgeses of the said court of Parliament have, use, and enjoy; and in like wise shall and may take all and every such liberties, advantages, dignities, privileges, wages, fees, and commodities concerning this said court of Parliament, to all intents, constructions, and purposes as any other the knights and burgeses of the said court shall, may, or ought to have, take, or enjoy.

An act for the more effectual preventing bribery and corruption in the elections of members to serve in Parliament. 2 Geo. 2. chap. 24. sect. 4.

And be it enacted by the authority aforesaid, That such votes shall be deemed to be legal which have been so declared by the last determination in the House of Commons; which last determination concerning any county, shire, *city*, borough, cinque port, or place, shall be final to all intents and purposes whatsoever; any usage to the contrary notwithstanding.

EXTRACT from the Commons Journals relating to the city of Chester.

(See Appendix, No. 15.)

EXTRACTS from records of judgments against the several boroughs after mentioned, office copies of which records are ready to be produced.

Borough of Malmesbury.—Michaelmas, 36 Cha. II. Rot. 135.

Information, in quo warranto, against the aldermen and burgeses of Malmesbury, for claiming to be a body corporate, and exercise divers privileges there enumerated; and against Henry Witt, for claiming to be the alderman, and eleven other persons, for claiming to be burgeses. Mich. Term, 36 Ch. II.

The defendants being summoned, and not appearing, judgment of seizure quousque was given; and then the record proceeds thus: Judgment quousque

“ And afterwards, to wit, on Thursday next after the octave of the purification of the blessed virgin Mary, in the first year of the reign of our lord James, now king of England, &c. before our lord the king Hilary Term, 1 James 2.

“ king

" king, at Westminster, cometh Sir Robert Sawyer, knight, attorney general of our now lord the king, who for the same lord the king in this behalf prosecuteth, and giveth the court here to understand and be informed, that the aforesaid alderman and burgessees of the borough of Malmesbury, and the aforesaid Henry Witt (and the eleven others *nominatim*) have not yet appeared, nor replevied the liberties, privileges, and franchises aforesaid; wherefore he prays the judgment of the court, that the liberties, privileges, and franchises aforesaid, may be taken and seized into the hands of the lord the king, as forfeited: and that the aforesaid Henry Witt (and the rest) for the usurpation of the liberties, privileges, and franchises aforesaid, may be taken. Whereupon all and singular the premises being seen and understood by the court here—

Final judgment.

" It is considered, that the liberties, privileges, and franchises aforesaid, in the information aforesaid specified, be taken and seized into the hands of the lord the king; and that the aforesaid alderman and burgessees of the borough of Malmesbury aforesaid, and the aforesaid Henry Witt (and the rest) do in no wise intermeddle about or in the liberties, privileges, and franchises, above mentioned, or any of them, *but be wholly excluded from them and every of them*; and that the aforesaid Henry Witt (and the rest) be taken, to satisfy the lord the king for their fine for the exercise and usurpation of the liberties and privileges aforesaid, upon the lord said the king, &c. (c)"

2d January, 1 Will.
Ham and Mary.

Writ of error brought in parliament by the defendants.

The plaintiffs in error, assigned errors, and the attorney general pleaded in *nullo est erratum*.

13th May, 2 Will.
Ham and Mary.
Judgment reversed.

It is considered by the aforesaid court of parliament, that the judgment aforesaid, in the said court of the said lord Charles II. late king of England, and the lord James II. late king, rendered, be revoked, annulled, and altogether had for nothing; and that the aforesaid aldermen and burgessees of the borough of Malmesbury, and the aforesaid Henry Witt (and the rest) be restored to all that they have lost on account of the judgments aforesaid.

City of York.—Easter, 36 Cha. II. Rot. 12.

Whit-Term, 36
Charles 2.

Information, in quo warranto, against the mayor and commonalty of the city of York, *for claiming to be a body corporate*, and to exercise divers franchises there enumerated.

Easter Term, 36
Charles 2.
20th July, 1 Ja. 2.
Mich. 4 Ja. 2. de-
fendants appear.

Judgment quousque, for want of an appearance.

New charter granted—(a copy of which will be produced.)

Afterwards, to wit, on Tuesday next after three weeks of St. Michael, in the 4th year of the reign of the lord James II. by the grace of God now king of England, Scotland, France, and Ireland, defender of the faith, &c. in the court of our said lord the king, before the king himself, at Westminster, *come the aforesaid mayor and commonalty* of the city of York, by Simon Harcourt, their attorney, and having heard the information and judgment aforesaid; they pray, That they may be restored to the liberties, privileges, and franchises aforesaid, seized into the hands of the lord the king, for want of the appearance

(c). After this final judgment, and before the writ of error brought, viz. 23d October, 4 James II. a writ of mandamus issued, directed to the alderman, stewards, and capital burgessees of the borough of Malmesbury, to swear Elias Ferris into the office of alderman of the said borough, as appears by the controulment roll, 193, of 4 Ja. II. (*in dorso*); an office copy of which is ready to be produced.

appearance of the said mayor and commonalty of the city aforesaid, and *that the hands of the lord the king may be amoved therefrom.* Whereupon, afterwards, to wit, on Tuesday next after one month of St. Michael then next following, all and singular the premises being seen and understood by the court here —

It is considered by the court, That the aforesaid mayor and commonalty, for that they have appeared to the information aforesaid, be restored to the liberties, privileges, and franchises aforesaid, and the hands of the lord the king be amoved therefrom, &c. And the aforesaid mayor and commonalty of the city of York pray a day of imparling until the octave of St. Hilary, and it is granted to them before our lord the king, wherefoever, &c. The same day is given to Sir Thomas Powis, knight, now attorney general of our said lord the now king, who for the said lord the king in this behalf prosecute, &c. And afterwards, to wit, on Tuesday next after the morrow of All Souls then next following, the aforesaid Sir Thomas Powis, knight, now attorney general of our said now lord the king, who for the said lord the king in this behalf prosecute, for that no one cometh on the behalf of the said lord the king to inform the court in the premises, and there is not any other evidence given or offered against the aforesaid mayor and commonalty of the city of York, the said attorney general of our now said lord the king, for our said lord the king, saith, That he will not further prosecute the aforesaid mayor and commonalty of the city of York in this behalf: therefore let process wholly cease in court against them.

Judgment of restitution.

Cesset processus.

Borough of Poole.—Easter, 36 Charles II. Rot. 10.

Information, in quo warranto, against the mayor, bailiffs, burgesses, and commonalty of Poole, *for claiming to be a body corporate,* and to have divers liberties and franchises there enumerated.

Mich. Term, 35 Charles 2.

Judgment quousque for want of appearance.

Easter Term, 36 Charles 2.

New charter granted, and enrolled in Chancery (20 pars pat. 4 Jac. II.)

15th Sept. 4 Ja. 2.

Charter of release, and restoration of the old corporation. See page 258 of Douglas's Report of the Poole Case, in his second vol. of cases on controverted elections, p. 225.

Same year.

Borough of Laughour.—Mich. 36 Charles II. Rot. 11.

Information, in quo warranto, against the portreeve, aldermen, and burgesses of Laughour, *for claiming to be a body corporate,* and exercising several franchises therein enumerated.

Trinity Term, 36 Charles 2.

Judgment of seizure quousque for want of appearance.

Mich. 36 Cha. 2.

Writ of seizure thereon. Controlment roll, 218.

Final judgment of seizure and ouster.

Easter, 1 James 2.

Writ of seizure thereon. Controlment roll, 85.

N. B. Office copies of each of these writs are ready to be produced.

Copy of LETTER MISSIVE for the election of members to the convention parliament, A. D. 1688, with the return thereto for the city of Chelster, from the petty bag office.

Whereas the lords spiritual and temporal, the knights, citizens, and burgesses, heretofore members of the commons house of parliament, during the reign of Charles II. residing in and about the city

of London, together with the aldermen and divers of the common-council of the said city, in this extraordinary conjuncture, at our request severally assembled, to advise us the best manner how to attain the ends of our declaration, in calling a free parliament, for the preservation of the protestant religion, and restoring the rights and liberties of the kingdom, and settling the same, that they may not be in danger of being again subverted, have advised and desired us to cause our letters to be written and directed for the counties, to the coroners of the respective counties, or any of them, and in default of the coroners, to the clerks of the peace of the respective counties; and for the universities, to the respective vice-chancellors; and for the cities, boroughs, and cinque ports, to the chief magistrate of each respective city, borough, and cinque port, containing directions for the choosing in all such counties, cities, universities, boroughs, and cinque ports, within ten days after the receipt of the said respective letters, such a number of persons to represent them as from every such place is, or are, of right to be sent to parliament, of which elections, and the times and places thereof, the respective officers shall give notice. The notice for the intended election in the counties, to be published in the market towns within the respective counties, by the space of five days, at the least, before the said election; and for the universities, cities, boroughs, and cinque ports, in every of them respectively, by the space of three days, at the least, before the said election, those letters, and the execution thereof, to be returned by such officer and officers who shall execute the same, to the clerk of the crown, in the court of chancery, so as the persons so to be chosen may meet and sit at Westminster the two-and-twentieth day of January next.

We heartily desiring the performance of what we have in our said declaration expressed, in pursuance of the said advice and desire, have caused this our letter to be written to you, to the intent that you truly and uprightly, without favour or affection to any person, or indirect practice or proceeding, do and execute what of your part ought to be done, according to the said advice, for the due execution thereof, *the elections to be made by such persons only as, according to the antient laws and customs, of right ought to choose members for parliament*; and that you cause a return to be made, by certificate, under your seal, of the names of the persons elected, annexed to this our letter, to the said clerk of the crown, before the said two-and-twentieth day of January. Given at Saint James's the nine-and-twentieth day of December, in the year of our lord one thousand six hundred and eighty-eight.

PRINCE OF ORANGE.

To the chief magistrate, or such others of the city of Chester, in the county of Cheshire, who have right to make returns of members to serve in parliament, *according to the antient usage of the said city, before the seizure or surrender of charters made in the time of king Charles II.*

11th of January 1688. The execution of this letter *appears* in the certificate hereunto annexed.

WILL. STREETE, Mayor.

I William Streete esq. (*mayor of the city of Chester*) doe hereby humbly certifie, that according to the direction and appointment in the letter hereunto annexed, having assembled the citizens of the said

said city, according to the ancient custome, for the elections of members of parliament for the said city, the said cittyzens have then assembled have duly chosen Roger Whitley esq. and George Mainwaring alderman, their representatives, to meet and act for them att the next convention, to be holden, the two-and-twentieth day of this instant January, att Westminster.—In witness whereof, I have hereunto set my hand seale, the eleventh day of January A. D. 1688.

(a) WILL. STREETE, mayor, (L. S.)

ELECTORS.	Rob. Hewitt. (a) Robert Murray, Sheriffe.
John Mainwaring.	Antho. Heathom. John Goulborne, Sheriffe.
Ed. Wynn.	Lewis Parry.
G. Booth.	Timothy Deane.
Henry Llewis.	Rob. Anderson.
Peter Edwards.	William Hinde.
John Wright	Rob. Sparke.
Richard Mynshall.	John Caldecot.
Ben. Chrichley.	Thomas Bolland.

(a) These officers were restored by king James II. as stated in the relator's pleadings.

CASE of the DEFENDANT.

The defendant hopes, that the judgment of the court of King's-bench below will be affirmed, for the following among other

R E A S O N S :

Because the old corporation of the city of *Chester*, that had subsisted under the charters of Henry VII. and Elizabeth, was dissolved by the judgment upon the *quo warranto* stated in the replication. The citizens and inhabitants of *Chester* were incorporated by the accepted charter of *Charles II.* stated in the plea. That corporation, and the charter which created it, still subsist; and the defendant in error was duly elected and admitted to the office of alderman under that subsisting charter. On the part of the plaintiff in error, various objections have been made.

That king Charles II. had no power to grant such charter, because the charters of Henry VII. and Elizabeth, and the corporation created and confirmed thereby, notwithstanding the said judgment, still subsisted. First objection.

I. *Because a corporation cannot be forfeited or dissolved, either by its own act, or by any judgment of a court of law.*

Answer. Every franchise is by law liable to forfeiture for abuse. No exception to this general rule is found in favour of the franchise of being a corporation; and it appears from the case of the corporation of the city of *London*, the authorities there cited, and a variety of other cases, that corporations are subject to the same rule.

II. *Because the information, being in disaffirmance of the corporation, should not have been brought against the mayor and citizens in their corporate capacity, but against the individuals by name who were supposed guilty of the usurpation.*

Answer. Though the information might have been brought against the individuals by name, it might also be brought against them in the corporate name which they had themselves assumed. They acted as a corporation *de facto*, they might have been so *de jure*. Whether they were or not, and whether they had forfeited the franchise of being so, could not be known till judgment. There are many instances of similar informations; and in some of them judgment

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ment has been given against the corporation, which, in consequence of such judgment, became extinct. At all events, in the present case, the defendants neither having pleaded in abatement, or reversed the judgment by a writ of error, that judgment remains in force.

III. *Because a corporation cannot be forfeited before appearance.*

Answer. Informations in the nature of *quo warranto* are founded upon the statute of *quo warranto*, 6 Edward I. and on the proceedings relative to franchises before the justices in eyre: from which, and from the comment upon the said statute in the 2d *Inst.* 282. it clearly appears, that if a party in possession of a franchise, on being summoned to appear before the justices in eyre, did not appear, the franchise was seized into the king's hands, which, in the same eyre, the party might replevy; but if he did not appear to replevy it during the continuance of the justices in the county, the franchise was forfeited and lost for ever. A franchise being therefore liable to forfeiture without appearance in a proceeding before the justices in eyre, from reason by analogy, it should be equally liable in a proceeding before the court of King's-bench; the contumacy in not appearing, and the presumption arising from it that the party had no defence, being applicable alike in both cases. And it appears accordingly in 2d *Inst.* 282, and in 15 Edward IV. 7, that in a proceeding upon a *quo warranto* in the court of king's-bench, if the party claiming a franchise do not come in within a term after the issuing of the *venire facias*, the franchise is forfeited and lost for ever. In the present case, therefore, the defendants in the *quo warranto* stated in the replication having omitted to appear not only for a term but for a year, the franchises under the above authorities became forfeited and lost for ever, though without appearance, and without the form of final judgment regularly entered up.

IV. *Because the judgment of seizure quousque is only process to compel appearance, and no final judgment was entered.*

Answer. It appears from the above authorities, that before the justices in eyre it was not necessary that final judgment should be entered up, and that the forfeiture was complete without it: nor indeed could such judgment have been entered up, the party having a right to appear till the last moment of the continuance of the justices in eyre; and the power of the justices determining with their continuance in eyre, the right of entering up a judgment determined at the same time. If final judgment was unnecessary in the eyre, it is equally unnecessary in the court of King's-bench.

It therefore was not necessary that any judgment should be entered up. The franchise of being a corporation was extinguished, at the time of granting the charter of Charles II. by non-appearance; and if a judgment were necessary, the judgment stated was sufficient. The judgment of seizure extinguishes the franchises, and vests them in the king; and the additional words have no material effect in the present case. The franchises being forfeited, the court had no right to make any further order; and if they had, and the franchises of the corporation were suspended only, and not extinguished, the court never in fact exercised such right, or made such order: and if the franchises that were vested in the king by the judgment of seizure, were subject to be divested upon a future order of the court, yet, not having been so divested, they remained and were vested in him at the time of granting the said charter. And if, by reason of the words super-added to the judgment of seizure, he had only a defeasible interest in the franchises that were the subject of it, his grant of that defeasible interest would nevertheless be good, as appears from the
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case of *Alton Woods*, 1 *Coke's Rep.* 49, b. as well as from other cases.

V. *Because a judgment of seizure does not dissolve the corporation.*

Answer. Where the king can hold the franchise that is forfeited, the judgment of seizure vests it immediately in the king. In cases where he cannot, it takes the franchise from those who have it; as *Holt*, chief justice, expressly says, 1 *Showers*, 280. In either case it operates as an extinguishment of the corporation; and these propositions seem sufficiently warranted in the case above referred to, 15 Edward IV. and in the *King and Starveton, Yelwerton* 192, 2 *Bro. Ab. tit. quo warranto*, pl. 11, and title *extinguishment*, pl. 42, which are confirmed by cases where, in consequence of a judgment of seizure, corporations have ceased to have existence. The case of the corporation of London was decided upon the same principles; and, notwithstanding the universal unpopularity of the proceedings of the late king James respecting that corporation, and the inclination to defeat them, it appears evident from the 2 William and Mary, c. 8. enacted expressly to reverse that judgment, which was not reversed by a writ of error, and from the arguments of the judges in the case of the king against the mayor of the city of London, 1 *Showers*, 274, that the general opinion at that time was, that the judgment of seizure had dissolved the corporation.

VI. *That it should have been a judgment of ouster, and not a judgment of seizure.*

Answer. Where a party has exercised a franchise by wrong, and without any legal authority or grant, there the proper judgment is a judgment of ouster; but where he had once a right to it, and has since forfeited it by *non user* or *abuse*, there the judgment should be a judgment of seizure. In the first case, the king cannot have that which never legally existed. In the second case, he resumes and is restored to that which he is supposed to have originally given: and if it does not appear whether the exercise of the franchise commenced by right or by wrong, there may in such case be a judgment of seizure. *Yelwerton*, 192. 15 Edward IV. And even if a judgment of ouster were the more proper judgment, there is no colour to contend that the judgment of seizure unreversed is absolutely void.

VII. *That the judgment of seizure was not followed by a writ of seizure.*

Answer. It does not appear that a writ of seizure did not issue; and as the king had a right to seize, and the grantees under the charter of Charles II. have been long in possession of the franchises granted by that charter, it is to be presumed, if a writ of seizure were necessary to effectuate that grant, that such writ duly issued. But it seems wholly unnecessary that any writ of seizure should in fact have issued. The king's grant of the franchises that were forfeited, is equivalent to a writ of seizure; and though the writ of seizure is applicable to cases where the subject of forfeiture is corporeal, and capable of being actually taken, it is inapplicable where the subject is incorporeal, like the franchise of being a body corporate. 1 *Showers*, 275.

Upon these several grounds the old corporation being extinct, king Charles II. had an undoubted right to create a new one in the city of Chester, where there was at that time no body corporate existing; and he legally exercised that right by the charter stated in the plea, granted not to the old corporation, but to an entire new body, in which several of the members of the old corporation were particularly excepted.

That if king Charles II. had a right to grant such charter, it was void, as containing a power of removing, by the mere signification of an Second objection.

order of privy council, all the corporate officers, and thereby dissolving the corporation at the will of the crown, which is repugnant to the nature of the grant itself, and absolutely void; and that the king intending to reserve a power which he could not do, he was deceived in his grant, and the whole is void also upon that ground.

Answer. That the grant contains no such power of removing all the corporate officers at once, so as to dissolve the corporation, as appears from the provision expressly made for supplying the vacancies occasioned by removal under the directions of the charter, which could not be done if all the members were to be removed; it seems therefore to be the import of the grant, to reserve a power of removing so many of the corporate officers only, as would leave a sufficient number to fill up vacancies, and as was consistent with the existence of the corporation, which it was evidently not the intention of the charter to reserve a power of destroying. Under this construction of the charter, it contains nothing repugnant or illegal; and it is a settled rule in construing the king's grant, that if there can be two constructions of the grant, of which one will make it good, and the other will make it bad, the first shall be adopted, 1 Co. 45. a. 10 Co. 67. b. but if the king did reserve a power of removing all the corporate officers, the reservation is repugnant to the antecedent clause, whereby he grants to the mayor and citizens for ever; and of two repugnant clauses, the latter is to be rejected, *Hard.* 94. but it does not avoid the whole grant; and though the king were in this respect deceived in his grant, it does not arise from the false suggestion of the grantee, nor from any deceit or mistake in fact, nor in the condition on which the grant was made, but was a mistake in law of the king himself; and in a grant like this, purporting to originate *ex certâ scientiâ* and *mero motu*, such mistake in one part of the charter does not affect the validity of the rest, according to the distinction adopted in a variety of cases; and at all events, the grant is valid till it is repealed by a petition, or a *scire facias*.

Third objection.

That all the corporate officers were removed under the power reserved by the charter of Charles II. whereby the power of electing aldermen determined.

Answer. That the power exercised by king James, of removing all the corporate officers at once, was not reserved by the charter; and if it were, the reservation of such power was illegal, and consequently the removal was illegal and void.

Fourth objection.

That the charter of pardon and restitution did away the judgment quousque, determined the charter of Charles II. and restored the antient constitution of the city of Chester.

Answer. The charter of restitution is granted to, and accepted by, not the corporation created by Charles II. but the members of the old body; and king Charles II. having granted to the new corporation the franchises held formerly by the old one, had thereby precluded himself, and consequently his successors, from regranteeing the same franchises to another set of men, nor could he defeat the rights legally vested in the new body. The case is not varied by observing, that the charter of restitution is granted to the old corporation; for the same argument equally applies. Though the king may pardon, he cannot by that pardon, though in favour of the original owner, affect the right of others, or restore what he had parted with by an intervening grant.

EDWARD BEARCROFT.
FOSTER BOWER.
HUGH LEYCESTER.

HOUSE OF LORDS,

February 5th, 1790.

Mr. SERJEANT ADAIR.

May it please your lordships:

I Have the honour of attending at your bar, as counsel in this cause for his majesty; who complains of an error in a judgment given by the court of King's-bench, upon a record, the material parts of which it will be necessary to state to your lordships. [*Pleadings stated.*]

In considering the grounds upon which this judgment is impeached, and upon which we complain that it is erroneous, the house, I am sure, will indulge me if, from the deference due to the judgment of a court so respectable at all times, and so respectably filled as at present, and from the importance of the subject matter, I should find myself under the necessity of arguing the case more at length than I could otherwise have wished to do. Had that judgment been supported by a current of authorities; had the learned judges who pronounced it thought proper to convince us, that those which we cited in support of a contrary decision, were either misstated, not founded in law, or inapplicable to the case in question; I should have felt myself very unequal to the task of impeaching such a judgment; but your lordships will find, that the great number of authorities (which my duty will oblige me to trouble you with to-day) cited in order to convince the court that the judgment ought to have been for the crown, have been wholly passed over in silence; and we are, to this moment, at a loss to conjecture how it has happened, that the points which we conceive to be deducible from those authorities have been over-ruled.

The court, in giving their judgment, have, in opposition to all those authorities, and without explaining or distinguishing any one of them, rested their opinion merely upon two cases mentioned in that judgment; and of which, therefore, it will, in the course of my argument, be incumbent upon me to take a good deal of notice.

In order to draw your lordships' attention to the application of the points which, I shall contend, are established by the whole current of authorities in our books, it will be necessary for me to state, correctly, the effect of the judgment in the court of King's-bench, and what is declared by it in point of law; and your lordships will find, that, when compared with the record upon which it was given, and applied to principles of law, which I conceive to be indubitably settled, it goes a length which no authority has ever yet been adduced to support.

I conceive that there are two propositions which will not be controverted; one is, that in an information in quo warranto, the defendant must make good, in point of fact and of law, the title he has thought fit to state upon his plea; and that, if upon the view of the whole record, there appears a possibility, or even a certainty, that he has some other title, he cannot avail himself of any but that upon which he has rested his plea. That proposition is laid down distinctly in the case of the *King v. Leigh*, which is reported 4 *Burr.* 2146; which I believe has been denied in no part of the discussion which this case has hitherto undergone, and therefore I shall trouble your lordships with a reference but to that single authority to support it. It follows, of course, that unless Mr. Amery can support his title under the authority of the charter of king Charles II. judgment in this case ought certainly to have been given for the king.

There is another point equally undeniable, which is stated in the same authority I have already mentioned; namely, that by the rule of proceeding of the courts in informations, in the nature of quo warranto, if any one material issue upon the record is found for the crown, let all the other issues be found for the defendant, and let those other issues be ever so material, judgment of ouster must, upon that information, and upon that record, be given against the defendant.

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When, therefore, your lordships, keeping these two principles in your view, compare the judgment of the court of King's-bench, with the record which is now before you, you will find that the judgment of the court of King's-bench goes the length of affirming, that the effect of a judgment *quousque*, of a judgment expressed to be of seizure, only till the court shall otherwise order, without any writ of seizure stated to have issued, to carry even that judgment into effect, is operative *totally to destroy and annihilate* the capacity of a corporation, having a legal existence at the moment that judgment was given. That without being followed up by process; without being affirmed by *final* judgment; without being at all, in form or in substance, in the nature of a judgment of *ouster*; a mere judgment *quousque*, for default of appearance, has the effect of totally destroying and annihilating the existence of a corporate body; for unless it goes all that length, my learned friends will find themselves obliged to combat another principle, equally indisputable with the two that I have already stated to the house; which is, that two corporations, for the general government and direction of a particular place, cannot exist at one time in that place. *That* also is a proposition which, at the outset at least, I shall take no pains to establish in your lordships' judgment, because I am persuaded your lordships are perfectly acquainted with the grounds upon which it has been established, and because in no part of the discussion of this business has that proposition, any more than the others I have stated, been denied; but it appears clear that, if the corporation, which is stated to have existed at the moment of the judgment *quousque*, was not totally annihilated; if its corporate capacity was not completely done away, as if it never had existed at all; if there was any corporation in Chester, capable of being revived and restored; then it is impossible that the prerogative of the crown should extend to grant a new charter of incorporation to any other persons; and then they would be driven to contend, that there might be two corporations to the same purpose, existing in the place.

Lord Chancellor. Have you pleaded the corporation to be an existing corporation between the time of the judgment *quousque* and the time of the charter of restitution? or have you concluded that that existence rendered the charter of king Charles void, as repugnant and incompatible? And I will put you in mind of a difficulty, which I have not considered; I have read the pleadings, but have not had time to consider the law of them; you have pleaded a charter of incorporation, in the time of Henry VII. under the *seal of the county palatine of Chester*; I wish you to consider how far that plea is good, without averring the authority of that seal; because by common law the great seal is the only one that can create a corporation. You have pleaded, however, an *inspeximus* in the time of Elizabeth, as a confirmation of that corporation, and an ulterior grant in some other respects.

That brings the question to another head; how far the charter of Henry VII. under the seal of the county palatine of Chester, created a body *capable of such confirmation*? After having pleaded that, you don't conclude that the corporation, however created and existing under the charters of Henry VII. and queen Elizabeth, continued down to the time of the charter pleaded by the defendant, and rendered it incompatible; but instead of that, you have thought proper to introduce a judgment, *prima facie*, destructive of your own charter, for the purpose of removing that judgment yourselves; and after having so introduced it, you have stated the charter of restitution in the year 1688, by king James II. and your conclusion upon that plea is, "that from the year 1688, the letters patent of Charles II. ceased and determined;" not averring, in any manner, that the old corporation was in existence between the time of the judgment *quousque* and the time of that restitution.

These are articles in pleading which you certainly will not imagine, when I tell you I have not considered them, that I have formed any opinion upon. But I think it is right to mention the surmises that have arisen, that you may clear them up as you go on.

You make out your title in bar to the defendant's plea, supposing that plea to contain a title, for I believe it will be agreed, that the prerogative of the crown is,

to call upon those who exercise a franchise to shew with what warrant they exercise it; and that they must stand or fall upon the title they set forth in the plea.

Mr. Serjeant *Adair*. I feel myself much indebted to your lordship for the hints which you have been pleased to throw out; and with respect to one point, I think an immediate and a ready answer seems to present itself; which is, that upon the pleadings as they now stand, the question of the validity of the letters patent of Henry VII. under the seal of the county palatine of Chester, cannot arise, because the same replication expressly states that those letters patent were confirmed by queen Elizabeth, *under the great seal of England*, and that subsequent charter also (in some respects operating as a new grant) being stated to be accepted, and in force at the time of the judgment *quousque*, it excludes all argument on the want of validity of the charter of Henry VII. as being under the seal of the county palatine of Chester.

But the other point will be a proper subject of consideration, when I come to trouble your lordships with that part of my argument which applies to the effect of the restoring charter of king James.

At present, the ground I have stated to your lordships is, that if two corporations for general purposes cannot exist in the same place, the charter of Charles II. can be supported, upon no other supposition, than that the corporate existence of the former corporation of Chester, was wholly annihilated (as we are told by the judgment of the King's-bench) by the direct operation of a judgment *quousque only*; not followed up by any process or final judgment.

Further, if it is conceded to me (what I don't expect to hear denied in the course of the argument) that the finding of any one material issue upon the record for the crown, is sufficient to entitle the king to judgment; then the judgment of the King's-bench must have gone the length of declaring, that the issue taken upon a final judgment, stated by the defendant in his rejoinder, is wholly an *immaterial* issue; that a final judgment is *in all cases unnecessary*; and that a judgment *quousque* will, in all cases, have the same effect and operation as is ascribed to a *final* judgment by the defendant himself in his rejoinder!

Such are the lengths to which the effect of the judgment of the court of King's-bench must go; and I shall now venture to state to your lordships a very bold assertion, which I should not have presumed to make, if this case had not been already very much discussed; if I had not myself taken a good deal of pains (as much as my time and understanding would permit me) to sift the matter to the bottom: my assertion is this, that the propositions I have stated, the full length of which must be gone to warrant the judgment in question, are not only unsupported by any one judicial decision or determination whatever, but not supported to the extent in which I have stated them, even by any one dictum of any one judge, to be met with in any one book of the law!

The truth of this assertion, I flatter myself, I shall make appear to your lordships; and, in doing so, it must be manifest, that I shall not pass over those authorities which have been *supposed* to support the judgment. It will be incumbent therefore upon me, to state to your lordships the grounds upon which I impeach this judgment, and the propositions of law which it will be necessary for me to establish on the other side.

If, therefore, from what appears upon this record, upon the facts admitted, or found by the jury, I can maintain, that in truth the charter king of Charles II. was not the subsisting charter of the corporation of Chester, at the time that Mr. Amery was elected; in that case Mr. Amery will fail in having made good the title set forth by his plea; or, if I can prove, that there is any difference in legal effect, between a judgment *quousque*, and a *final* judgment, then I shall have made out the proposition that one material issue is found for the crown, and that judgment must be given against the defendant.

It seems to me that (taking it for granted at present that these principles of law will not be combated, as they have not yet been denied) it will be just, regular, and intelligible, to blend these two questions together, and take them up in one point of view:

view : for I shall contend that there is nothing in the effect of the judgment in this case (which was a judgment *quousque* only, not followed up by any process or further judgment) that could give legal effect and operation to the charter of Charles II. so as to make it the subsisting constitution of the city of Chester, at the time that Mr. Amery was elected, or at any other time whatever.

But I shall venture to go much further ; for I shall endeavour to shew, and to prove by authorities to your lordships, that the effect which by the judgment upon this record is ascribed to a judgment *quousque* (such as I have described it to your lordships) could not be produced even by a *final* judgment of *seizure* into the king's hands, nor even by a judgment of *ouster*, given against the corporation ! and moreover, I shall undertake to support this general proposition ; that a corporation once having a legal existence, and corporate capacity, cannot by law be dissolved, either by the prerogative of the crown, by its own act of surrender, or by any judgment whatever of the courts of law !

This, I am aware, at the first statement, will appear a strong proposition to your lordships. It is not necessary for me to go the full length of supporting it, in order to entitle the plaintiff in error to your lordships' judgment ; but it is a proposition so decisive, if it is true (and I shall produce authorities to satisfy your lordships that it is true) that I should not do justice to the cause I have undertaken, if I did not, in direct terms, endeavour to establish it ; still satisfied, that your lordships will perceive that infinitely less than this will be sufficient to reverse the judgment in question.

I will, in order as early as possible to remove the impressions which may have been made on your lordships' minds, by the seeming strength of the proposition last stated, begin *first* to support it by authorities. And the former part of it, that a corporation cannot be dissolved by the mere prerogative of the crown, I presume I shall not have much difficulty in maintaining.

At this time of day the prerogatives of the crown are too well defined ; I am sure too perfectly understood by your lordships, to render it necessary for me to take up much of your time in proving, that by the mere prerogative of the crown, a corporation cannot be destroyed. I shall cite only one or two authorities upon that point :—the first of which, in point of time, is in *Palm. 501*, in the report of the case of *Fulcher v. Hayward* ; a case which I shall have occasion to trouble your lordships with hereafter more at length, but which, at present, I cite merely because it is stated in the judgment on that case, that though the king may make a grant of a corporation, he cannot dissolve it ; and your lordships see the effect of the prerogative, as to the *dissolving* a corporation, is placed in the strongest point of view, because it is expressly stated, as contrasted with the power of *making* a corporation. It might at first sight appear that those who could create, could annihilate ; those who could give existence, could take that existence away ; but the opinion of the court is express upon that point, that though the king can create and grant a corporation, yet he *cannot dissolve it*.

This doctrine is carried much further in a very modern case, by the court of King's-bench, in the case of the *King v. the Vice Chancellor of Cambridge*, which your lordships know was upon a dispute with respect to the election of high-steward of the university, between lord Hardwicke and the earl of Sandwich. It is expressly stated, by the court, in that case, not merely that the crown cannot, by its prerogative, dissolve a corporation, and destroy its existence ; but still more forcibly, that it cannot even deprive that corporation of any rights it may derive from charter or prescriptive usage. (See p. 258.)*

It may appear, at first blush, more difficult to maintain, that a corporation cannot destroy its own existence, even by a surrender accepted by the crown ; that the act of the party who created the corporation, and the act of the corporation itself, shall not be sufficient to take away, and wholly annihilate, the existence of that corporation. Strong as that proposition is, your lordships will find it supported by the

* Where the authorities quoted are the same as those in the argument in the court of King's-bench, they are, for the sake of brevity, only mentioned here, and referred to by the pages.

the strongest and fullest authorities. It is not a novel doctrine; your lordships will find it holden so far back as the reign of queen Elizabeth, in the case of the dean and chapter of *Norwich*, reported in lord *Coke's* 3d *Rep.* 76, and in 2d *And.* 120; the same point is also declared in 2d *And.* 165. It was there held, that the old corporation of the dean and chapter of *Norwich* did still remain and continue at the time of that litigation, notwithstanding the surrender of their church, and of all their possessions. (See *p.* 255.)

This case of the dean and chapter of *Norwich* is cited and referred to, and the principle of it is also recognized, in *Davies's Reports*, folio 1 b.

I am aware that the statement of the case of the dean and chapter of *Norwich*, as reported by lord *Coke*, and by *Anderfon*, is liable to this observation; that the terms of the surrender, as there stated, are a surrender of their church, and all their possessions; and that, therefore, it might not import to extend to the franchises, but that the corporation itself might exist to other purposes, though they had surrendered, into the hands of the king, their church, and all their possessions. But your lordships will find that distinction completely done away; for the question respecting the existence of the old corporation of the dean and chapter of *Norwich*, came again before the court of King's-bench, at a considerable distance of time, in the third year of Charles II. in the case of *Hayward v. Fulcher*, and there it appears that the surrender goes so much further, as in truth totally to cut up any ground of distinction that might be taken upon the terms of it; for it extended not only to the cathedral church, and all their possessions, but to all their rights, liberties, privileges, and hereditaments, which they had by virtue of their corporation.

The king accepted that surrender; and upon the supposition that it was good, and that there then existed no dean and chapter of *Norwich*, he grants a new charter of incorporation, by the old name of dean and chapter of *Norwich*, with the addition of these words, "*ex fundatione regis Edwardi sexti.*"

Now although the surrender was stated to be enrolled in Chancery; although it was a surrender of all the rights, liberties, and privileges, which the dean and chapter had as a corporation; although that surrender, so enrolled, was accepted by the king; although the king conceived it to be a good surrender, to destroy the existence of that corporation; and, so conceiving, considered himself as the founder of a new corporation, and granted a new charter, with the additional words, describing him to be the founder; the judges of the King's-bench unanimously held, that the old corporation was not extinct, and therefore that the new charter was altogether void.

This is an authority, in the very reign of Charles II. by the unanimous judgment of the King's-bench, upon a special verdict, and solemn argument; and therefore the dean and chapter of *Norwich* remained, and remain to this day, the old dean and chapter of *Norwich* who existed before that surrender. (See *p.* 256.)

I shall trace this proposition down, in point of time, to the present. In the case of the *King v. Grey*, reported in 8 *Mod.* 358, the same question came before the court, somewhat in a different point of view; for in this case the chief question is stated to have been, whether, by a surrender of their charter, by the corporation of *Colchester*, made the 36 Charles II. that corporation was wholly dissolved; for if it was, thence the charter of king *William*, by which the lands and privileges were regranted, is void, because it was to a corporation not in being;—

Three of the judges held that it was not, and compared it to the surrender of a deed, that the estate was not thereby surrendered, therefore the corporation was still subsisting and had a capacity to take.

The court further state, that in the case of the city of *London*, several learned men were of opinion, that a surrender did not destroy the being of a corporation; this appeared in the surrender of abbies, in the reign of *Henry VIII.* for it was not thought proper, at that time, to rest barely upon those surrenders, but to have them confirmed by act of parliament.

It clearly, therefore, was the sense of the legislature, of the crown lawyers at that time, of all his majesty's advisers, just as it was the sense of the judges of the court at the time of the decision I have mentioned; that the surrender and acceptance alone of the being of a corporation, into the hands of the crown, was not valid without a confirmation by act of parliament. (See p. 256-7.)

Upon this proposition, therefore, I have stated, I trust, to your lordships, some very strong authorities; but before I conclude what I have to observe to your lordships upon that head, it is necessary to take notice of a seeming authority against it; and I am warranted by the result of the researches of men of more ability, and more industry, than myself, to say, that at a period subsequent to the giving of the judgment in this case against the corporation of Chester, that was the only authority to be found that looked the other way, and imported, that by the surrender of a corporation, its corporate capacity would be destroyed. That is a case reported in *Dyer*, 282, and certainly upon the report of that case, as stated in the printed edition of *Dyer*, the opinion of the court seems to be, that by a surrender of a corporation, and an acceptance, its corporate capacity was gone. I shall, therefore, think it necessary to shew your lordships why that is not, as it first appears to be, an authority to be weighed against the others, notwithstanding the respectable name under which the report is handed down to your lordships; but that is a mistaken authority, and does not go to the point to which at first it seems to be addressed.

This case in *Dyer* was thought necessary to receive an answer by those who argued, on the part of the city of London, in the great question of the *quo warranto*; and Treby, the then recorder of the city, thinks it necessary to go into the question, whether a corporation, once existing, can be destroyed by any means? and, among the rest, to consider the means of surrender. He cites the case of the dean and chapter of *Norwich*, and that of *Hayward v. Fulcher*; which I have troubled your lordships with. He then proceeds to take notice of this supposed authority in *Dyer*; and I shall read his words, which I am sure are better than any I can substitute in their place, and will have, as they ought to have, infinitely more weight with your lordships: "And whereas it hath been sometimes said, as it is there, they were dissolved by the surrenders, and the like; there is a very good answer given to all that *discourse* in *Palmer*, 495; for the case in *Dyer* underwent the consideration of the judges in *Hayward v. Fulcher*, which is reported at length in *Palmer*, and was by them held *not to be law*; where it is said, when they speak of a dissolution by surrender, 'tis a relation of fact only, and not of law: that is, they were dissolved in fact, so as that they did desert their house, and did demean themselves as if they were disincorporated, but they were not so in law; for they fancied a corporation could not be without lands, and so when their land and church were given up, they thought all was gone and dissolved; for, said they, a dean and chapter must be a dean and chapter of some place, and when the land is gone, how can they be said to be of such a place? no, said the judges there, that is no reason at all, for the corporation was before they had any lands, and if those lands were all evicted or they all disseized of them, yet they are a corporation still. And in 2d *Roll's Abr.* 185, 'tis said the abbies came to the king, *by the statutes of dissolution*; so that they had no opinion that the surrender did carry even their lands, though I do admit they did carry their lands, but I may say they could carry no more, they could not carry their being of the corporation." "There is a case in *Dyer*, 282, &c. (see p. 257-8)

Your lordships see by this that the supposed authority of *Dyer* is completely done away; in the first place, if it existed, it is an extrajudicial opinion, and not to the point in question; it appears also, that the surrender, in fact, was confirmed by act of parliament, which destroys the proposition of its being good without that authority; and it appears further, that this very *dictum* in *Dyer* is an interpolation, and is not to be found in the original report.

For

For all these reasons, therefore, I contend, that the cases I have stated establish the principle, that a corporation cannot be destroyed by surrender, and acceptance of the crown, and that it stands uncontradicted by any authority on the other side.

The next proposition I am to state to your lordships is, *that a corporation cannot be annihilated by a judgment of the courts of law.*

That a thing which never has been done, of which there is no instance (especially if the facts upon which it ought to operate, are likely frequently to occur) should be considered as contrary to law, and not to be supported by the opinion of the courts, is an argument which your lordships know is allowed to have considerable weight. That, therefore, is the first ground upon which I shall maintain, that the corporate existence of a corporation cannot be annihilated by any judgment of a court of law. Your lordships will attend to me all along, as meaning the *corporate existence* of a corporation, because there is no instance of any such judgment existing in the books. I have a very strong authority to contend, that down to the latter end of the reign of Charles II. and to the time of the quo warranto against the city of London, no such judgment had ever been given. I am in possession of that opinion in the argument of Mr. Finch, the solicitor-general, which is in page 14.

Mr. Finch was contending for the contrary proposition to that which I am now supporting; it was his business to argue, and he did argue, that a corporation might be dissolved by judgment; and when the very proposition he was at that moment contending was, that a corporation might be dissolved by a judgment, his admission that it *never had been done*, will certainly carry with it additional weight.

Your lordships are to judge whether it is not at least a very strong ground to presume, that such a judgment cannot by law be given, when none such ever existed, down to the time of which I am now speaking; if any such judgment has existed *since* that time, my learned friends will be so good as to produce it; but if they do not, I have a right to assert, that such a judgment never existed at all. (See p. 259.)

In the case of the city of London it became necessary to consider the mode of proceeding, and the effects of the different judgments, upon an information in quo warranto, and in what cases they might be given. That subject is very accurately considered by Sir Robert Sawyer, the attorney-general, in his argument; and it happens singularly enough in this cause, that when I refer to the case of the quo warranto against the city of London, I find much more to avail myself of in the arguments of the crown lawyers, than in those who argued for the city; and the authorities quoted by the former bear so much upon the present case, that I cannot better state the nature of the different judgments upon quo warranto, than in the manner in which they are explained by Sir Robert Sawyer, in the sixteenth page of his argument, in the same book. (See p. 259.)

Your lordships will there find, that a very accurate and weighty distinction is stated by Sir Robert Sawyer, with respect to the different kinds of judgment which may be given in an information in quo warranto. Where it appears, that the party against whom the information is brought, had *wholly usurped* the franchise, for which that information is filed; that it never had a legal existence, and never was in his legal possession; there the natural, the proper, the legal, judgment is of *ouster*, and the effect of that judgment will be completely to do away the *usurpation*, not to destroy *any thing which had before a legal existence.*

It is with equal propriety stated that the proper judgment is *not so*, where there *once was a legal right*; wherever there has been a right arising from grant or prescription, which presumes that it was once vested by law, *there* no judgment of *ouster* can be given, but the proper judgment is *of seizure into the king's hands*—the reason is correctly stated—because that which once, in fact and in law, proceeded from the crown, may properly be re-seized: and thus a material distinction is stated, in the ground of the two judgments, of *ouster*, and of *seizure into the king's hands.*

“In the case of the bailiffs and aldermen of New Radnor, which was by default, judgment of *seizure* was only given,” So that a judgment of *ouster* is not to be

founded upon a *default*; upon a default it appears indifferent whether the parties ever had a legal title or not; whether they usurped the franchise originally, whether they abuse it, or whether it had a legal existence; nay, from default, the presumption might perhaps be the other way; but he expressly states, that being by default, judgment of *seizure only* was given.

The case of New Malton, also quoted by sir Robert Sawyer, is very strong; where, in answer to the charge of having usurped to be a corporation, they had set up a false title, claiming to be a corporation by prescription, and *that* was found against them; yet as they had had an actual existence under a different title, judgment of *seizure only*, and *not of ouster*, was given against them.

It is also admitted in the course of the same argument in page 21, that the effect of such a judgment is not a *dissolution of the corporation*, which is the material point for me to contend; it is stated, "single bodies politic, have indisputably such conditions annexed to them upon the trust of their creation, and the breach of their condition is in law good cause of separating the politic person from the natural by deprivation; which in the civil law is of the same effect as judgment of ouster by the common law;" and their suspension hath some resemblance with our seizures into the king's hands.

Now your lordships perfectly know, that *judgment of deprivation does not annihilate a corporation sole*; it separates, as it is stated in the books, the natural person from the exercise of the corporate functions, the corporate functions still exist; they are capable of being restored to the same person, he may be put in possession of them without any regrant, or they may be given to another natural person; and it is here stated, that the effect of a judgment of seizure, *suspends the functions only*, but *does not dissolve the corporation*. (See p. 260-1)

That the franchise of being a corporation, cannot be dissolved by any authority less than that of parliament, appears very strongly from a case which is stated by my lord Coke in his 4 *inst.* 228, that of the corporation of Cambridge;—the corporation of Cambridge had misconducted themselves in a very violent degree: they had been guilty of very outrageous riots and tumults; they had broke open the treasury of the university; they had compelled the chancellor and scholars to give a release to them in their corporate capacity of all manner of liberties, of actions real and personal, and also to be bound to them in large sums of money.

Upon complaint of these matters, information against them was made; your lordships will find, that notwithstanding the enormity of these transgressions, and the excessive abuse they had made of their power as a corporation, it was the opinion of that time, and is the opinion of lord Coke, that *judgment of ouster could not be given against them in their corporate capacity without the authority of parliament*.

It is stated that they submitted themselves to the king's mercy and grace, saving their answers to all other matters. The king thereupon, *by common consent of parliament, and by authority of the same*, seized the same liberties into his hands as *forfeited*; and after, the king granted certain liberties to the said mayor and bailiffs, and increased their former fee farm.

Now a seizure may be made into the king's hands, undoubtedly by common process, and by ordinary judgment; but not as *forfeited*, so as to *put an end* to their liberties; but so anxious is lord Coke, lest that might lead future lawyers mistakenly to fancy, that a seizure of the corporate capacity as *forfeited* into the king's hands, could be made without the authority of parliament; or that parliament acted in that case, rather as a court of judicature (which anciently it sometimes did) than in its legislative capacity, that he expressly adds, "*Nota by act of parliament*." (See p. 261) Your lordships will find strong evidence, that a seizure into the king's hands of the rights of a corporation, does not annihilate the corporate capacity, by a variety of instances which are to be met with in the books, and upon record of franchises regranted to the old corporations; and of corporations acting after seizure into the king's hands, and in many instances, even during the time of such seizure existing.

Now all these cases go to shew, that the corporate capacity is not annihilated by a judgment of seizure; for if it were, there would be no corporate person capable of taking a regrant, and still less could they have acted during the time of such seizure. There are an infinite number and variety of cases of that kind to be found; I will mention a few, and refer to the places where they are mentioned, and stated, for the rest.

There is an instance of that kind in *Cro. Car.* 252, and a vast number of these instances are collected in the case of the quo warranto against the city of London. This case is in page 30 of sir Robert Sawyer's argument, "in the 18 of Edward I. the town of Southampton was seized into the king's hands, for wounding even to death an officer in serving the king's writs; they after submitted to a fine, and took a new grant, and raised their fee farm rent to twenty pounds per annum." Yet I believe it has come within the observation of many of your lordships, even within a very late period, that the corporation of Southampton is at this moment a corporation by prescription, and is so pleaded upon all records.

That therefore is a decisive proof, that the judgment of seizure in Edward the first, did not destroy the corporate existence of Southampton; for if it had, they must have stated as claiming under the charter of Edward the first, being the new grant by which their liberties were restored.

The case of New Malton, in Trinity the sixth of James is also in point to this. It is stated as an express authority, that a liberty may be *seized* by judgment in a quo warranto against the inhabitants of the town by their corporate name, "an information was brought against the bailiffs and burgesses of New Malton, and the form of it is the very same with this against the city of London. They plead by their corporate name, and entitle themselves to the liberty by prescription; there was verdict and judgment against them, by their corporate name, of *seizure only*, that the liberty be taken and seized into the king's hands; and, which is more, the *captantur pro fine* against them, is entered by the corporate name of *Ballivi et Burgenses*, though the corporation by the seizure was dissolved; and the reason no doubt was, that that general name was a sufficient description of the persons, who were liable to the fine for their usurpation." Yet the corporation of New Malton, like that of Southampton, still exists, and *exists as a corporation by prescription*.

There are several instances also, with respect to the city of London itself. The quo warranto of Charles the second, was not the first attack made by the crown upon the rights of the city of London; upon former disputes these rights were called in question, sometimes agreeably to law, sometimes perhaps a little too violently; but, notwithstanding the repeated instances which are to be found in the books, of judgment of seizure, and of actual seizure, of the rights of the corporation of London, your lordships know, that to the present day, the corporation of London is *a corporation by prescription*, and the existence of the corporation under grants long antecedent to the times of those seizures, was not denied even in the argument upon the case of the quo warranto (See p. 262-3.)

The next point of view in which I shall consider this case is, that even if a corporation could by any judgment of a court of law be destroyed, as to its corporate existence, in the manner that it may perhaps be by the natural death of all the members (as for instance, supposing that it could be destroyed by judgment of *ouster* being given *against all the members* without exception) yet still I contend, and shall prove by authorities, that such judgment could not be given upon an information like that stated upon the present record: for your lordships observe, that the information in the reign of Charles the II. upon which the judgment in question was given, is not against A. B. C. and other persons usurping and claiming to be a corporation, and taking upon themselves, without any authority, the name and style of mayor and citizens of Chester; but it is against the mayor and citizens of Chester themselves *as such*, described as an *existing corporation*, and charging them with having *usurped the franchise of being a corporation*. Now I have several authorities to prove that upon such an information, *no judgment of ouster, or even of seizure, can be given*.

The

The first is in 2 *Roll. Rep.* 15. It is expressly stated, that if a quo warranto be brought with a view to *dissolve a corporation*, the writ ought to be brought *against the particular persons*, for the writ supposeth that it is no corporation; it is repugnant and absurd to state by the writ that they *are* a corporation, and yet alledge that they have usurped that franchise and are not a corporation; it is contradictory in terms, and no such judgment can be given upon that writ.

The difference there taken is stated in Pollexfen's argument, page 70.

Lord Chancellor. Suppose it is an information for *misuser*—

Mr. Serjeant Adair. That may unquestionably be brought against the corporation itself in its corporate capacity, for as such it may have abused its franchises.

There are two cases in which a prosecution is properly brought against a corporation *as such*: one is the case mentioned by your lordship of *misuser* of the franchises, and upon such a case, judgment of seizure may be given against the corporation in its corporate capacity; but from the authorities I have stated, I contend, that the effect of that judgment of seizure so given, is not tantamount to a judgment of ouster, and does not go to annihilate their corporate capacity.

Then there is another case, in which an information may be against the corporation itself; that is, where a corporation having a legal existence as a corporation, usurps *other* rights which were not granted them; there also the *judgment is of ouster*, because in that case it is found that they never had these rights, and therefore the judgment is *ut abinde excludantur*, as to those rights for which it is filed; but in the case of the quo warranto of Charles II. against this corporation, there is no complaint of abuse of authority, but they are called upon to shew why they claim to be a corporation; but they cannot be ousted of that which they never had; the thing is repugnant and contradictory, as much to common sense as to the legal form of proceedings.

If it was intended to oust the then mayor, aldermen, common council, and freemen of the city of Chester, of their corporate capacity, and to make that separation between the individual and the corporate body, which, if total, might perhaps amount to a dissolution of both, the information should have been against the mayor by name, against the aldermen by name, against the common council by name, and against the freemen severally and respectively, to state by what authority they claimed to be a corporation; it might have appeared that they were not a corporation, and then judgment of ouster would have gone against them all.

But the writ supposes and states a corporation of Chester, and then it asks that corporation to state how it comes to be a corporation; this judgment does not leave it indifferent whether this corporation of Chester were really usurpers, it is impossible that a corporation can usurp to be a corporation, for if it is a corporation it is no usurpation; if it is not a corporation, it is A. B. and C. who usurp to be what they are not; I contend, therefore, that this was not an information upon which a judgment of ouster could in *any case* have been lawfully given. (See p. 264-5.)

I shall not trouble your lordships, with stating a great number of instances which are to be found, of corporations acting in their corporate capacity, after judgment of seizure into the king's hands; of corporations taking re-grants, being held to be in of their former rights, after a judgment of seizure into the king's hands; of corporations continuing corporations by prescription, after a judgment of seizure into the king's hands; every instance of that sort which your lordships will find in the books, and the much more numerous instances which will be found upon searching the records and rolls of the different courts in Westminster-hall, are a direct proof, and just so far a judicial authority, to shew that the effect of that judgment of seizure does not go to an annihilation of the corporate capacity.

I cannot help stating to your lordships one instance that strikes my eye at the moment.

It is in the 15 Edward I. where the liberties of the city of London were seized into the hands of the king; and that went much further than has been done here, for *actual possession was taken* and the king acted in consequence of that seizure, by putting in a *custos* to govern the city, during the suspension of the rights of the corporation,

corporation: if therefore that judgment of seizure was an annihilation of the corporation of London, king Edward I. should have granted a new charter; *he did no such thing*, having kept possession of the city for eleven years, he withdraws his *custos*, and then all goes on as smoothly as if nothing had happened. Though that was done in 15 Edward I. and continued to 26 Edward I. your lordships will find that this writ of seizure did *not even suspend the corporate functions* of the city of London; for during that interval a writ of right was tried in the court of hustings of London, according to the prescriptive usage of that corporation. (See p. 263.) Your lordships will find a variety of other instances, in the case of the London quo warranto, in pages 30, 31, and 70, of the same case.

There is, besides this, another ancient authority that goes to the same point; it is that of lord Coke, in his reading on the statute of Westminster, upon a clause of that statute which authorizes the king, upon the taking of excessive toll, by those who had the grants of markets (than which there can hardly be conceived an abuse that more directly *affects* the corporate capacity itself) to seize the franchise: the words made use of are, *prendra le franchise*. How does lord Coke construe these words? "shall seize the franchise of the fair market, *until it be redeemed by the owners*. But this is also intended to be *upon an office found*." So that nothing can be stronger, to shew how this principle of law was impressed upon the mind of that learned lawyer, that the king could not seize any franchise as forfeited. (See p. 263.) That leads me to a more modern case, in which the same doctrine has undergone the consideration of the courts, and in which these points seem to be very fully established; to wit, that judgment of ouster cannot be given against the corporation in its corporate capacity, and that, whatever a judgment of ouster might do, a judgment of seizure does not in itself *destroy* a corporation; that is Sir James Smith's case, which happened soon after the revolution, and which is reported in three books, 4 *Mod.* 58 and 59, *Skin.* 310 and 1 *Shorr.* 274.

That case was argued much at length, and with great ability on both sides. The question was, whether there should be a mandamus to admit sir James Smith to exercise his functions, as an alderman of London? and the fact was, that upon the revolution, an act been made, requiring such persons as had held any offices in corporations, to take a certain oath prescribed by that act; and in failure of so doing, they were not to exercise their corporate functions.

It was returned, that sir James Smith was an alderman of London at the time of passing the act, and that he had not taken that oath. The question was, whether that was a good return, and whether a peremptory mandamus should not be granted? the direct question therefore was, whether sir James Smith, at the time of passing the act, remained an alderman of London, notwithstanding the judgment in quo warranto? Your lordships have heard, from the record, what the only judgment that ever existed in the present case is; it is a judgment of seizure into the king's hands, for want of appearance, till the court should otherwise order.

I will read what the judgment in the quo warranto in London was: "It is adjudged, that the liberties, privileges, and franchises aforesaid, to be by themselves a body-corporate and politic, in deed, fact, and name, by the name of mayor, commonalty, and citizens, of the city of London; and by that name to plead and be impleaded, to answer and be answered, by the aforesaid name of mayor, commonalty, and citizens, of the city of London, shall be taken and seized into the hands of our lord the king, until the court shall otherwise order; and that the aforesaid mayor, commonalty, and citizens, of the city of London, are taken till they make satisfaction to our lord the king, for the usurpation of the liberties, privileges, and franchises aforesaid."

Now so far was the court, in sir James Smith's case, from entertaining an idea that a judgment of seizure *quousque* would annihilate a corporation, that, on the contrary, your lordships will find them deciding, that this judgment of seizure, and a fine for usurpation of the franchises, did not even annihilate the franchises of the corporate officers; and that at the time the act passed, subsequent to the revolution,

many

many years after the judgment in quo warranto, and before any charter of restitution, sir James Smith *was still an alderman of that corporation, notwithstanding that judgment.*

Indeed the court did, in that case, hold, that by some means a corporation might be dissolved; for it is created upon a trust, and if that be broken, it is forfeited, and then a ground of forfeiture must be alledged. But their opinion was unanimous, clear, and decided, that such effect could not be produced by a judgment of seizure (though it was a *final judgment* and not a *judgment quousque*) and that no judgment which could produce such an effect could be given *against a corporation in its corporate capacity.* Though there is a doubt expressed upon the generality of the proposition, by one of the judges in that case, yet I have his authority concurring with all the rest, that such a judgment cannot be given against a corporation in its corporate capacity, and that a judgment of seizure cannot do that which he conceives might possibly be done by something else.

They say, expressly, "that by a judgment of seizure a corporation is not dissolved; for it doth neither extinguish nor dissolve the body politic; for if it were dissolved, to what purpose should it be seized? Whereas when judgment is given for the king against any persons, for a franchise usurped, the persons shall be excluded, and by no means intermeddle with it; which is a judgment of ouster; but a quo warranto must then be brought against particular persons; but where it is for a liberty claimed by a corporation, there it must be brought against the body politic, in which case there may be a seizure of the liberty, which will not warrant either a seizure or a dissolving the *corporation itself.*"

Therefore the court say, the corporation not being dissolved, sir James Smith was still an alderman, and ought to take the oaths before the first day of August, and so judgment was given in Hilary term following, that no peremptory mandamus ought to go. (See p. 265-6.)

Before I dismiss this case, it will be necessary both in candor, that the house may be apprized of what opinion lord Holt was; and for another part of the argument, to state what *Skinner's* report of the case is. All the reports concur as to the decision of the court, which goes the length of saying, that the judgment of seizure did not only not extinguish the corporate capacity of the corporation, but did not destroy that of individuals. Lord Holt states, that his opinion was, that a corporation *might be dissolved*; and then Skinner adds this note concerning the private opinion of lord Holt, "that such was his opinion *in domo parium* where ten judges were *e contra.*"

I have cited this for the purpose of giving my learned friends any advantage that they may derive from the very respectable opinion of lord Holt; perhaps I was a little selfish in making them that present, because I claim to myself the opinion of ten judges in opposition to it, concurring with me in the general proposition, to its utmost extent, that such a dissolution *cannot be.* Your lordships will inquire, where that opinion is to be found? I cannot tell your lordships where it is to be found, but I can tell upon what occasion it was given, and I have the respectable evidence of this very learned reporter to shew what that opinion was.

The time alluded to by the report in *Skinner*, was the twenty-second of Jan. 1689, and your lordships will find on your own journals of the 22d and 23d of January in that year, that all the judges of England were called upon to give, and did give, their opinion upon that point, respecting the declaratory clauses of a bill then brought into the house.

Your lordships know that the opinions given by the judges do not appear upon the journals; all, therefore, that your lordships can learn is, that upon those days the judges delivered their opinions upon the questions then propounded to them. What those opinions were I learn from the report I have just mentioned. I learn that the opinion given by lord Holt (and, I will presume, by one of the other judges, though not stated) was, that a corporation *may be dissolved*; but I learn, at the same time, that ten of the judges were of a contrary opinion. Your lordships

know

know that when we come to consider judicial opinions, it is not the learning or ability of this or that particular judge that is to be considered, but the majority makes the judgment, and the majority makes also the authority.

But I am not only in this case in possession of the opinion of ten judges, for the proposition, to its fullest extent (which is rather beyond what I need) but I have the opinion of lord Holt, and all the judges, that a judgment of ouster, to dissolve a corporation, cannot be given against a corporation as such; and that the effect of a judgment of seizure is not only not to dissolve a corporation, but is, not to dissolve even the franchises of the particular members of that corporation. (See p. 266-7.)

It therefore only remains upon this part of the case for me to make good that bold assertion with which I set out; that in the extent to which I need them, to wit, that a judgment of seizure *quousque*, given upon an information in quo warranto, cannot produce the effect contended for; there is *no one authority*, or even *dictum*, to be found. Which leads me to consider those which have been supposed to warrant this judgment.

After the number and weight of the authorities with which I have, I am afraid, fatigued your lordships upon this part of the case, your lordships will be a little surprized to hear, that all those authorities, in giving judgment, have been passed over in silence; that the existence of no one of them has been denied; that no attempt has been made to explain or reconcile them; that no argument has been used to shew that they do not apply to the point in question; but that they have been all passed by without the least degree of notice, in order to make way for *two* others, so extremely cogent, so decisive, so clear, so indisputable, that the weight of these two authorities ought to overturn all the rest!

Lord Chancellor. We have no way of knowing what the judges *did say*, or what *they did not say*, and you are too well acquainted with the practice not to know that you appeal against what the judges *do*, and not against what they *say*.

Mr. Serjeant Adair. It will be necessary for me to take notice of the only authorities which have, from any quarter, been cited in opposition to us. I don't know whether I am at liberty to refer to any *report* of the judgment of the court from which we bring the writ of error, or to rest upon the record alone. If I am at liberty to refer to any report—

Lord Chancellor. If you think fit, you are at liberty to refer to the report.

Mr. Serjeant Adair. I will then refer your lordships to the reasons given for the judgment (wishing to treat it with all possible respect) in the reports, from term to term, of cases decided in the King's-bench; it was from thence that I was led to state, that the authorities upon which the judgment was founded, were considered as so weighty and cogent, that it was perfectly unnecessary to take notice of or to distinguish any on the other side.

The first of them is taken from the year-book of the 15 Edward IV. in the year 1475, and that seemed to be principally relied upon, for it was conceived that the decision in that case was, that the effect of a judgment of seizure, for want of appearance, if the party did not appear within a limited, and that a very short time too, amounted to the forfeiture of his franchises, and was conclusive, for as in the court of eyre, upon a writ of quo warranto, judgment of seizure given for want of appearance became final and conclusive, if the party did not appear during the continuance of that eyre; so it was said to be the opinion of the judges in that case, that a similar effect is produced by a judgment of the court of King's-bench, provided the party does not appear within the same term. So that the court were supposed in this case to have adopted the analogy between the proceedings of the court of King's-bench, and the justices in eyre. Now nothing can be more unfounded than any such analogy; for the authority of justices in eyre expires with the eyre; it is an authority *for that time*, and when quo warranto is brought before justices in eyre, if there were not some means to compel the party to appear, and for not appearing to incur a forfeiture, the jurisdiction of the eyre, which is given by act

of parliament, would be wholly taken away, because the party would have nothing to do, but to hold back till the expiration of the eyre, and then the writ of quo warranto would be lost,—*that* is a decisive distinction; for of necessity, if the eyre has any jurisdiction, it must have a jurisdiction to enforce appearance *during that eyre*, else no judgment could be given; the authority of the court of King's-bench *never* ceases, never dies, it is *as immortal as a corporation*, it never can be dissolved, and it is impossible for any party to elude the jurisdiction of the King's-bench, by refusing to appear for a time; the reason therefore for the analogy in no case holds.

But there is another distinction upon the case, taking the opinion as *supposed* to be given in 15 Edward 4; that opinion is not upon an *information* in the nature of a quo warranto, but upon a *writ* of quo warranto; your lordships know that many authorities are stated (*Siderfin* 36 for one, I shall only refer to them) that the proceedings upon an information in quo warranto, and upon a writ of quo warranto, are totally different; and they are different in the very point of this case, for a judgment of seizure upon a writ of quo warranto may be final (it is said)—but not so (as is expressly distinguished) in an *information* in quo warranto.

So that in the first place, the supposed analogy between the eyre, and the court of King's-bench, totally fails in every point in which it is applied; in the next place, the law, with respect to a writ of quo warranto, is not applicable to the case of an information in quo warranto; the proceeding in a writ of quo warranto is by *summons* and *seizure*; in an information by *venire* and *disringas*; so that by distinguishing from time to time it is, that the parties are compellable to appear, and the jurisdiction of the the King's-bench is abundantly sufficient to compel that appearance.

But your lordships will be surprized when you find that this, I was going to say *single* authority, but I correct myself and say, this *one of those two* authorities, when it comes to be sifted, with that accuracy and attention which ought to be used in a matter of the infinite importance of the case before your lordships; you will be surprized to find, proves the direct contrary! and that it ought to have been cited by *me* in the first part of my argument, in support of the propositions which I stated, and an authority which I *would* have cited, if I had not reserved it for the sake of distinguishing it now.

First, let us see correctly what the report in the year book-itself is. Your lordships know in the manner of stating these reports in the year book, that there is no distinction between the argument of the counsel and the decision of the bench; the whole proceeding passes in a kind of dialogue between the counsel and the bench, and it is only by a reference to the cotemporary records, that you can discover which of the speakers were counsel, and which the judges. We have resorted to these records, and your lordships will find that all the colour that is to be collected from this case, even in the year-book itself, is from the argument of the *counsel*, and not from any thing said by the bench. I will therefore state what was said by the different speakers, and *who they were*. (See *appendix to the relator's case*. No. 1, p. 394.)

Your lordships therefore see, that upon debate amongst the judges (a difference of opinion prevailing in the course of that debate) at length they are unanimous in holding, that upon default in this writ of quo warranto, for a market, in the King's-bench; judgment of *seizure only*, and *not judgment of ouster* should be given. There is a short report of the result of the judgment, in the same case, in *Jenkins's Centuries*, page 141; and Jenkins reports it in these words, which appear to be a clear and distinct state of the sum of the judgment in the Exchequer-chamber. "A quo warranto is brought in the King's-bench. The defendant being summoned, makes default, and another default at the return of the *venire facias*; judgment shall be, that the franchise shall be seized into the King's hands." Your lordships will attend to the words that follow, which are extremely material indeed, "and not that it shall be forfeited, for it does not yet appear, whether there be cause of forfeiture, and no man shall finally lose his land or his franchise upon any default, if he has never appeared."

It is reported *there*, as the unanimous decision at length of the "judges of both benches" in the Exchequer-chamber; that the franchise should be seized, and should not be forfeited, for the reason given; that it does not appear yet, whether there should be cause of forfeiture, and that no man should lose his land or his franchise upon any default, if he has never appeared. Though it seems that a full statement of what was said in the year-book, and a full state of the case by Jenkins, overturns this as an authority against us, and shews it to be for us; that the judgment should be of seizure only, and should not operate as a forfeiture, and that no man should lose his franchise for want of appearance; yet we have searched the rolls and records for the *case itself* as well as the judgment of the court; and we find, from the most diligent search that can be made, in the controlment rolls of the crown office, that there is but one case of quo warranto in the period, from Hilary 14 Edward IV. to Hilary the 15 Edward IV. both inclusive; and that case is manifestly the same with that reported in the year book.

It is the case of the king against Quadryng, for the abuse of the franchise of a market, and we have from the record all the proceedings in the cause; we have the first process of the king to the sheriff of Lincoln, requiring him to summon William Quadryng, "to shew by what warrant he claims to have a market every week on Saturday, at the town of Burgh in le Merthe, in the county of Lincoln, without the licence and will of us, and our predecessors." That, your lordships see, is the first process upon a writ of quo warranto, the summons issued in Hilary term 14 Edward IV. to appear in the octave of St. Hilary; at which day the sheriff returned that he is summoned; and because the court here is not advised, concerning the process to be thereupon farther made in this behalf, a day is therefore given as well to John West, who prosecutes, as to William Quadryng, until in fifteen days from the day of Easter." So that your lordships see the court was not advised what process to issue, at which day there is adjudged by the court a writ of *venire facias*; to answer on the octave of the Trinity wheresoever, &c. In Michaelmas term there is an *alias venire facias* on the octave of St. Hilary, on which day there is a writ of *disfringas*.

Then your lordships see, that the argument which is stated in the year book, passed in that stage of the business after the *second* default. The argument is in the King's bench, and there the judgment given by the King's-bench, appears, from the report I have stated, and more distinctly afterwards (for I will state the very judgment) to be a judgment of seizure and not of forfeiture. Your lordships will find that so far from its being considered as a *final* judgment, or that by that judgment of seizure the party was *foreclosed* and *lost* the franchise of his market; the same writ was followed up by successive process, in Michaelmas 20 Edward IV. Hilary 20 Edward IV. Easter 21 Edward IV. Trinity 21 Edward IV. Michaelmas 22 Edward IV. Hilary 22 Edward IV. Trinity 1 Richard III. and so on down to Michaelmas 2 Richard III.; at all which different periods, repeated processes were issued upon the same writ of quo warranto against Quadryng, and at last in Michaelmas the 2 Richard III. the sheriff returned that William Quadryng was dead, which made an end of the suit. (*See appendix to the relator's case, No. 3, p. 397.*)

Lord Chancellor. You stated a writ of *disfringas* after the second *venire*—

Mr. Serjeant Adair. Yes.

Lord Chancellor. And does your record furnish you with *disfringas* after that?

Mr. Serjeant Adair. All the subsequent process, during the same king, were by *disfringas*. In 1 Richard III. they again sue out a *venire facias*; so that they seem to have considered the process as abating by the death of the king, and they commence a new process in the time of Richard; but neither the one nor the other of those could have been the case, if the judgment given in 15 Edward IV. had been considered as a final judgment, and operating as a foreclosure of the market.

We have also examined the other rolls in the Treasury, of the same cause, and we find, "pleas before our lord the king, in the term of Trinity, in the fifteenth year of Edward IV. witness T. Billyng;" who was then chief justice a con-

tinuance as of the term of the Holy Trinity, roll 29. "Sometime ago, that is to say, on the 24th day of November, in the fourteenth year of our lord now king, &c." (See p. 398) So that there is not the smallest pretence to contend for this, as an authority that a judgment of seizure into the king's hands could amount to a judgment of seizure as forfeited, not even where process is issued upon it, and a return actually made that the market is seized. For if the doctrine contended for be true, all process would cease; there the cause was completely at an end. Quadryng had lost his market for ever; he had made a default which could not be cured; and yet you find, after the date of that return of the execution of the writ of seizure, the process going on in the manner I before stated, till the second year of Richard III. So that the party is not limited to this time or that, to the next term (as is contended) for appearance; but if he had appeared at any time during the reign of Edward IV. at any time during his successor's, he still was warranted to come in. It appears to me, therefore, that if there is to be found in the books one authority stronger than another, that a judgment by default, upon a writ of seizure, cannot operate as a final judgment to extinguish a franchise; it is this case which has been cited as an authority to the contrary.

There is one other authority which is in 2 *Inst.* 282, with which I confess I was a little startled when I first looked at it. I was thus far startled; I apprehended that it might at least have obliged me to lessen the universality of my proposition, that there was *no single authority* to be found in the books to oppose to the current of authorities that I have collected on the other side; but I am happy to say, that upon a similar investigation of that case, which I have, as far I had opportunity, myself given it, it amounts to nothing like the authority it is supposed to be, and is in truth founded upon *another* in part; and the way in which I shall explain it to your lordships will be by giving you, correctly, the authority upon which this *dictum* of lord Coke appears to be founded; for a *dictum* of lord Coke, to the purport stated, there certainly is.

It is in his reading upon the statute of Gloucester, stating the consequence of making default in proceedings before justices in eyre, upon those words which are the text of his comment, *Et si non venerint, &c. præcipiatur vicecom. quod faciat eos venire, &c. quo die si non venerint, &c. fiat sicut in itinere iusticiariorum.*

And that your lordships see is the very clause of the statute of Gloucester, which was relied upon in argument in the case of the King v. Quadryng, but over-ruled clearly by the judgment of the court.

Then, says lord Coke, "if before the justices in eyre, the party come not, the franchises shall be seized into the king's hands, in the name of a distress, which the party in the same eyre might replevy, but if he did not replevy them while the eyre sat in the county, *the franchises were lost and forfeited for ever*; and so it is in the *King's-bench*, if the party come not in upon the *venire facias* during the term, and replevy his franchises, *they shall be lost for ever.*" Now this is the *dictum* (in its full strength) of lord Coke; it is a *dictum* which goes to support an opinion contrary to what I have been contending for, and I will leave my learned friends in full possession of it, after I have stated the authority upon which it is founded.

Lord Coke cites, to support that *dictum*, the case in the 15 Edward IV. which I have cited already from the year-book. I may venture to say, that authority does not support him, but proves the direct contrary; lord Coke cites the year-book, 2 Edward III. 29. 6 Edward III. 5. Now I would give all respect due to his opinion, but your lordships know that how great soever the deference due to a man expressing his opinion upon a particular subject may be, yet if he himself states the authority upon which it was founded, that opinion can have no weight beyond such authority. If lord Coke had contented himself with stating that such was his opinion, without referring to any authority at all, my learned friends would have been entitled to say, "such was the opinion of lord Coke;" and his opinion is great and respectable, even unsupported by authorities. But when I refer your lordships

lordships to the authorities upon which his opinion is founded, your lordships will judge whether they support the opinion or not.

Lord Coke has referred to 2 Edward III. 28, 29. It is in Trinity term 2 Edward III. and when I state the case, your lordships will find it like the King v. Quadryng; a case that I ought to have stated in the outset, for it makes for my proposition, and against the judgment which has been given.

This was upon a quo warranto in eyre against Roger Mortimer and Joan his wife, to shew by what warrant they claim to have cognizance of all manner of pleas, as well of the crown as others, against the king's pleasure, in their manor of T. Roger and Joan say, that Walter de Lacy, ancestor of Joan, was seized of the manor of T. long before the time of king Richard; from which Walter the inheritance descended; and then the plea goes on to state the several descents, so as it became vested in M. the mother of Joan, in coparcenery with other persons; and that Joan and Roger in their right held the manor and franchise aforesaid in parcenery, by descent, as aforesaid. And then they proceeded to pray aid, as in cases of parcenery, which your lordships know, in that period of the law, was usual; and it states, that for divers causes, the said franchise had been seized into the hand of king Edward I. and had since been granted to G. and M. to hold in the same manner as Walter de Lacy, the ancestor of M. had holden, and by that title it was held of the king, and claimed. Judgment was demanded for the king, because it was by a different title, being by charter, and not by descent, or in parcenery; so that judgment was given for the king. Your lordships, therefore, observe, that it was a judgment grounded upon an allegation, that they had set up a wrong title, and had prayed aid, when they were not intitled to it; the record was removed for error, by Mortimer and Joan, and the error assigned was, that they had alledged they held in parcenery, and had prayed aid, and that the justices had ousted them of aid, where aid was grantable by law; and that there was error (and this is the material part of the case) *because they had forejudged them of their franchise, for not answering further, but resting on the prayer of aid, and FOR DEFAULT OF ANSWERING THEY SHOULD NOT HAVE BEEN FOREJUDGED OF THEIR FRANCHISE, BUT IT SHOULD HAVE BEEN SEIZED INTO THE KING'S HANDS.*

Now your lordships see that upon this very case, upon assigning error, it is said, there should have been only judgment of *seizure* into the king's hands; and it is expressly stated as error, that the judges had given judgment of *forejudger*.

Your lordships will hear the judgment of the court upon this error assigned. Scrope said, "in some cases the franchise should be placed in the king's hands, in some it should be *seized*, as in his right, until they should make fine, and in some cases it should be *forejudged*;" he puts the different ways in which the court should proceed, and the three different judgments they may give; "but forejudger remains for ever, and because we see by this record that the justices had ousted them of aid, where by law it was grantable, and moreover (which is the point that applies to this case) had awarded, that they should be forejudged of the franchise because they did not answer further, but held themselves to the aid; whereas, *for want of pleading, the franchise ought not to be forejudged*, though the answer of the party was not sufficient; the court therefore award, that the judgment is erroneous, and ought to be held for nothing."

Is it possible for me to state an authority stronger, for my proposition, than this which lord Coke has referred to as a support of his *dictum*? for it is one of the errors assigned; and the court held the judgment to be erroneous, because they had *forejudged* a franchise for want of further answer, when it ought only to be *seized* into the king's hands. All my industry has not been able to find in the books a stronger case in support of my argument, than this very case which is referred to as an authority for the contrary proposition.

There is but one other authority referred to by lord Coke, that is, the 6 Edward III. 5. That was a quo warranto against the archbishop of York, for claiming prize of wines. And referring your lordships to the page of the report, I shall content myself

myself with stating, without danger of being contradicted either by my learned friends, when they refer to the book, or your lordships, when you inspect it, that there is not in that case a word applicable to that authority, except what is said by the counsel for the king, who said, "if they don't answer to the writ, we pray the franchise may be seized into the king's hands." How it was possible for lord Coke to refer to those cases as an authority to say, the proper judgment was of seizure, and *that the franchise should be lost for ever*, I cannot conceive; but it shews how the greatest men may be liable to inaccuracies, if they have not recourse to the authorities to which they refer.

I hope I have established now that proposition, strong as it is, with which I set out, that *the being of a corporation cannot be annihilated by any judgment whatever*; that though there may perhaps be found some *dicta* in the books to shew, that it may be done by judgment of ouster, upon an information properly calculated to support that judgment; such judgment of ouster cannot be properly given upon such an information as that exhibited by the attorney-general of Charles II. against the corporation of Chester; for such judgment should be against individuals, and not against the corporation itself; that the judgment we appeal from would be reverfible for error, if that issue had been found for the defendant, for it would have been clearly upon the face of the record, an error.

Then it will follow still from the argument, a *fortiori*, that if a judgment of ouster cannot be given, and has not been given upon this record; that if a final judgment of seizure into the king's hands cannot have the effect of dissolving a corporation, but that even individuals still preserve their corporate capacity; much less can a judgment of seizure *quousque* the court shall further order, have the effect which the highest judgments in the law could not obtain.

Upon this part of the case I think it would be wasting your lordships' time to proceed further; I have taken up a great deal more of your lordships' time than any thing from me can be entitled to; the only apology I can make is, that I have not taken up that time in producing arguments spun out of my own brain, and my own opinions, but in citing the greatest authorities of the law, in support of my argument. Having transgressed so much on your lordships' patience, on this part of the case, I shall pass but slightly over the remainder.

Lord Chancellor. I should be sorry you should pass slightly over any thing you thought material. You have argued this very ably. The final judgment is now laid out of the question; but if it were here, what would be the effect of it? Would it not be a good and effective judgment, at least until reversal, as to all the real effects of a good judgment?

Mr. Serjeant Adair. Certainly, till reversed, as to all the legal effects it could have; but whatever might be the effects of that judgment, your lordships can no longer hesitate about the existence of such judgment, because upon this record it is completely negatived.

[The lord Chancellor here suggested, for the consideration of the counsel on both sides, whether a material objection did not lie against the formality of the defendant's plea, no averment being made of the actual appointment of the first mayor, aldermen, and common-council, under the charter of Charles II.]

Feb. 9th, 1790.

BEFORE I proceed to submit to your lordships the remainder of what I have to offer in argument upon this case, as it originally came to your lordships' bar; I think myself bound to take notice of some points, which were thrown out for the consideration of the counsel.

Every thing which falls from such an authority merits attention. I am anxious to remove every thing like difficulty upon a case, which appears to me perfectly clear, when fully considered; and I hope to be able to prove, to the satisfaction of the house, that the objections stated to the pleadings, on our part, cannot at all avail in your lordships' decision.

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The first is, That the charter of Henry VII. stated in our replication to be the subsisting charter of the corporation of Chester, is said to be under the *seal of the county palatine* of Chester; and that objection I conceive to be founded in this principle, that none but the king *de jure coronæ* can create a corporation.

To that I answer, that the franchise of a county palatine differs essentially from franchises of every other kind and description whatever; it is a franchise of so high a nature, that the count palatine has, within his county, to all intents and purposes *jura regalia*, as the king has in right of his crown in the rest of the kingdom: and it is explained in the old books, that he is to hold as freely and largely, *by his sword*, as the king himself holds *in right of his crown*.

In *Davis's Reports*, 62, a question came on respecting the counties palatine in Ireland. The law of England is stated upon that subject, that a count palatine, created by the king of England, is lord of an entire county; and that he has in that county *jura regalia*, which consist in two principal points—in royal jurisdiction, and in royal feignories. The book then proceeds to say, that, “by reason of his royal jurisdiction, he holds all the high courts and offices of justice which the king has; and that by the royal feignory, he holds also all the royal demesnes and escheats which belong to the king: for which reason that county is in truth disjoined, and separate from the crown; as is said in the case of the dutchies, in *Plowd.* 215, so that no writ of the king shall run there, except writ of error, which being the last resort, an appeal is alone excepted out of all their charters.”

Thus, therefore, my lords, it appears that the nature of the franchise of a count palatine, essentially differs from that of any other; and though it is generally true that no subject, by virtue of a grant of the king, can create a corporation, yet that must certainly be understood with exception of counties palatine, which have all the rights of royalty, every prerogative of the crown, within their royalty (except only of deciding in the last resort of pleas criminal and civil) appointment of all officers; erecting of all courts of judicature, &c. all of these exist in, and are grantable under, the seal of the county palatine.

The same doctrine is laid down in 4 *Inst.* 204, where the court of the dutchy chamber of Lancaster, at Westminster, is spoken of as being also a county palatine. It is called *comitatus palatinus*, not in respect of the dignity of an earl, but from the county, and from the palace of the king; because the owner thereof, be he duke or earl, hath in that county *jura regalia*, as fully as the king hath in his palace, from whence all justice, honours, dignities, franchises, and privileges, as from the fountain at the first, flow; neither by this charter was the duke of Lancaster created count palatine, but the county was made a county palatine. The power and authority of those that had counties palatine was *king-like*; for they might pardon treasons, murders, felonies, and outlawries thereupon; they might also make justices in eyre, justices of assize, of gaol-delivery, and of the peace; and all original and judicial writs, and all manner of indictments of treasons, and felony, and the process thereupon, was made in the name of the persons having such county palatine; and in every writ and indictment within any county palatine, it was supposed to be *contra pacem* of him that had the county palatine. But these and some others are taken away from them that have such counties palatine, and annexed to the crown; that is, by the statute of Henry VIII. with which your lordships are acquainted; many of those high jurisdictions which could be exercised by the count palatine, within his county, and which could be exercised by the crown when the county palatine became annexed to the crown, in his right as under the county palatine, are, by the statute, directed to be in future done by the king, in right of his crown, and under the great seal.

Lord Chancellor. What is that statute?

Mr. Serjeant Adair. The 27 Henry VIII. cap. 29. It appears also by the grant to the duke of Lancaster, by which Lancaster was made a county palatine, that the grant of the powers and privileges of the county palatine of Lancaster, was made with express reference to the pre-existing county palatine of Chester; and it is stated, and appears in all the books and antient records, that the county palatine of Chester was the most antient and high franchise in the kingdom; and was created

created by William the Conqueror, by a grant to Hugh Lupus. The privileges granted were, that he should have all the rights of the county palatine of Chester.

Lord Kenyon. In whom is the earldom of Chester now?

Mr. Serjeant Adair. In the heir apparent to the crown, in the prince of Wales.

Lord Kenyon. I think not—

Mr. Serjeant Adair. He is *earl of Chester*.

Lord Kenyon. *Titular earl of Chester.*

Mr. Serjeant Adair. If the rights of the palatine pass not to him, *they are in the crown.*

Lord Kenyon. The duchy of Lancaster is kept an inheritance distinct, not to merge in the crown.

Mr. Serjeant Adair. Distinctly so; and the reason of that is given in the books; lord Coke expressly states, that Henry the IV. having been duke of Lancaster before his accession to the crown, had a clear and indefeasible title to him and his heirs in the duchy of Lancaster; and therefore doubtful of his title to the crown, he took care, by act of parliament, to keep the duchy of Lancaster separate from the crown; that in case of any future disposition of the crown, in prejudice of his interest, still the duchy of Lancaster might descend to his heirs; so that otherwise, independent of that act, the duchy of Lancaster would have been in the king.

Lord Kenyon. Suppose it had, I believe in the duchy of Lancaster, all the commissions of the peace, and all appointments of office, are under the duchy seal; in the county palatine of Chester never, since it has been united to the crown.

Mr. Serjeant Adair. In the next authority that I shall trouble your lordships with, you will find a distinction taken between the seal of the duchy and the county palatine of Lancaster; and which is directly in point to the present question, but before I pass over what lord Coke says respecting counties palatine, I think it necessary just to call your lordships' attention to a single line, in which that great lawyer seems to recognize expressly the authority of the very charter of which I am now speaking; for he states, in page 215 of the second *institute*, that the city of Chester was made a county of itself by king Henry VII. by letters patent of the sixth of April, in the twenty-first year of his reign; so that your lordships see, that I have not only the authority of lord Coke, in his second *institute*, that the count palatine has *jura regalia*, in an extent that certainly will enable him to create a corporation under his seal, but have a direct recognition, that the king himself has exercised that power, by this very charter, which is stated in this record to be under the seal of the county palatine.

The only remaining authority, that I shall trouble your lordships with, upon this point, is to be found in 2 1237, a question in replevin upon some lands belonging to the duchy of Lancaster; the general statement of the case and the question, it is not material to trouble your lordships with, but the passage which I mean to quote as directly bearing upon the present question, is this, "*All corporations made within the duchy, and out of the county palatine, by the duchy seal, are without warrant.*"

So that your lordships find, here is an opinion (conformable to the doubt that was thrown out upon this subject, upon the principle, that none but the king could grant a corporation) that the duke of Lancaster by his duchy seal could not grant a corporation; and therefore it is stated, that "all corporations made within the duchy," but your lordships will observe the words that are added, "and out of the county palatine by the duchy seal, are without warrant;" so that here it is recognized, that the limits of the duchy and county palatine are not co-extensive, and that the authority which holds corporations, made under the duchy seal of the duke of Lancaster to be without warrant, extends only to those within the duchy, and out of the county palatine.

But it does not stop there, for it goes on to state, that to make a corporation is *jus regale*, and cannot pass by the duchy seal; but within a county palatine, the king, by the duchy seal, may make a corporation; because there the duke of Lancaster had *jura regalia*. I have, therefore, here an express authority in point, where the

the distinction is marked clearly between a county palatine and every other franchise, even the high franchises granted to the duke of Lancaster as such, and in right of his duchy of Lancaster; that to them the general principle, that the king alone can make a corporation, should apply, but with an express reserve, that it does not apply to the county palatine; for that a count palatine in his county palatine has *jura regalia*; that on the contrary, *jura regalia* comprehends expressly the right of making a corporation, and may be exercised under the seal of the county palatine. I should mispend your lordships time, therefore, if I were to state any further authority, this being directly in point, and bearing upon the present question before your lordships.

Lord Chancellor. The question I believe was, whether the court would take judicial notice of the existence of that authority, or whether it must be averred? There is a difference between allowing that the county palatine may be created, supposing the word *county palatine* to be a technical law-phrase, and not to be a popular and general description of the prerogatives and privileges that are granted, if it be technically a law phrase, what is comprized in that phrase? whether a county palatine may be erected with more or with fewer franchises? but let it be erected with as many franchises as it will, and supposing it to be perfectly clear, that the seal of the county palatine would create a corporation, whether the court has legal knowledge of the existence of the county palatine, or whether it ought to be averred?

Mr. Serjeant Aldair. It is stated in the books that to a county palatine belong *jura regalia*; your lordships will also find this laid down, that by the grant of a county palatine these rights pass; then I conceive that shews the description of a county palatine to be a description of which the courts have legal knowledge; it is a legal and technical description, which implies in it those *jura regalia* which the law annexes to that franchise, as contra-distinguished from all other franchises (I believe) that can be granted. It does not only rest there, but I conceive in any way of putting it, it could not have been pleaded in the passage alluded to by your lordship, otherwise than it has; for if the averment in the plea, after stating that the king had granted that charter under the seal of his county palatine of Chester, had been followed up by an averment, that the authority of the seal of the county palatine of Chester was sufficient to create that corporation, it would have been an averment of the *law*, and not of the *fact*.

We are not bound to draw conclusions of law upon the pleadings, but to state the facts, from whence your lordships are to draw those conclusions; all that we, therefore, were bound to state (I am now supposing that we were bound to state it at all, I hope I shall presently satisfy your lordships we were not) was, the fact that it *was* granted, and the authority *by which* it was granted. For from the authorities of the books (a few of which I have mentioned, and there are many more that your lordships will find, if you continue to entertain any doubts at all upon this part of the case) it appears we have stated enough in law to shew, that this charter was well granted, because we have averred, *that it was granted under the seal of the county palatine of Chester*; and your lordships will find, that the statute of Henry VIII. which alters the course of proceedings, with respect to those grants under the seal of the county palatine, and transfers them to the crown of England *jure coronæ*, is a recognition (of which your lordships are bound to take judicial notice) that before that time the law was otherwise.

I apprehend that this would be a sufficient answer, provided the allegation stood in such a state that it was necessary for us to support it. But I conceive that nothing can be more clear, than that it is not at all necessary; for I have already troubled your lordships in a former part of the argument with authorities, which, till they are impeached, are decisive, to shew that the defendant must stand or fall by his own strength upon this record; that he must support the title he has set forth in his plea; and, therefore, having claimed title under the charter of Charles II. it is sufficient if we overturn that title, and it is not incumbent upon us to shew that

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any other title exists in any body else, or that the corporation of Chester were possessed of any other charter whatever. If there appears enough upon this record to satisfy your lordships that the defendant cannot have a good title under the charter of Charles II. then it is immaterial whether the charter of Henry VII. is well pleaded by us or not.

But I cannot help having still recourse to this argument, that it is described to be granted under the seal of the county palatine, by the king, and to be accepted. Besides, it is stated in the conclusion of the same plea, that there was a subsequent charter of confirmation by Elizabeth, under the *great seal* of England, in right of her crown; which confirmation, as well as her charter, was accepted.

And it appears further, that the charter of Elizabeth was a charter of *grant* as well as *confirmation*, for a new authority is granted to the corporation by that charter, with respect to the election of officers, in a case not noticed by the former charter of Henry VII. so that it appears, that the city of Chester, at the time of the judgment in quo warranto (which is the averment in our replication) was in possession of a charter of Henry VII. under the *seal of the county palatine*, confirmed and re-granted, with a new privilege, by Elizabeth, under the *great seal of England*. And, in truth, so firmly was it conceived, that the seal of the county palatine was not only sufficient to pass this franchise within the county palatine, that it might even have been doubted, whether a grant under the great seal of England would have been good, if it had not been for the statute of Henry VIII. And it is in the recollection of the learned judge who first tried this cause, that an objection was taken under the issue of *non concessit* to the charter of Charles II. as not being under the seal of the county palatine, but under the great seal of England *alone*. And the answer to that objection was drawn from the statute of Henry VIII. which is unquestionably a satisfactory answer.

Since the statute of Henry VIII. there can be no doubt that the king has a power to grant, by his great seal, in the county palatine, as well as throughout the kingdom. Before that statute, I conceive, from the authorities I have stated, and others that might be found, that it not only appears that he had a power to grant by the seal of the county palatine, but that in truth, before that statute, he could grant by no other.

This objection will be material, upon no other supposition than that they should succeed, in establishing the charter of Charles II. as good in all events, except that of there being a subsisting charter of Henry VII. at the time of its being granted. Now your lordships will find in other parts of the argument, *that* will by no means be decisive upon this case.

Another objection, which was hinted at upon the state of our pleadings, applied to the second replication, is—the not averring, that the charter of Henry VII. continued and was in force *after* the judgment *quousque*, upon sir Robert Sawyer's information; the averment in that replication only being, that that charter remained, and the charter of Elizabeth remained, in full force and virtue *before, until, and at*, the time of the said judgment.

Now I conceive a little attention to the state of the pleadings will satisfy your lordships that this is all we needed to have averred. The principle that the defendant must make good the title stated in his own plea, applies most peculiarly to this part of the case; for the only use we make of the charter of Henry VII. at all—the only reason whatever for introducing it upon this record by us at all, was, not that it was incumbent upon us to shew what the constitution of the corporation of Chester was; not that it was incumbent upon us to shew a mode of election, different from that under which Mr. Amery claimed to be elected, but merely for the purpose of giving an additional reason upon this record, why the charter of Charles II. could not be valid and effective; “because,” say we, “there were other prior charters which were in force, before and at the time of the judgment; because” “there existed a corporation of Chester at the time of that judgment; and we” “argue from thence, that it could not be annihilated by that judgment, and consequently

“ frequently remained in full force and virtue, at the time the charter of Charles II. was granted; for we have averred that it was in force *at the time* of the judgment *quousque*.”

The opposite party, apparently admitting this, and that the judgment *quousque* was not sufficient to put an end to the old body, have rejoined, “ but there was a *further*, a *final* judgment; and thereby,” “ say they, “ that corporation, of which before “ we had admitted the existence upon the record, was put an end to.” Taking the whole of this together, it does appear sufficiently stated upon our pleadings, that the charter of Henry VII. was a subsisting charter, *after* the time of the judgment, and after the time of granting the charter of Charles II. It is averred by us, no issue is taken upon it, no negation whatever upon their pleadings. It stands an admitted fact, that it was in force at the time of the judgment *quousque*; they don’t themselves aver that it was put an end to by that, but by *another*, judgment, *subsequent* to, and different from, the former. We deny that fact, and it is found against them; the consequence is, that the old charter was not destroyed by the judgment *quousque*. It, therefore, stands sufficiently clear upon this record, taking the whole together, that the charter of Henry VII. is, *at this moment*, the subsisting charter of Chester.

Therefore, requesting your lordships’ recollection of the authorities which I have stated at length, in the former part of this argument, to shew that the judgment *quousque* did not, nor could, by its legal operation, put an end to the charter of Henry VII. or to any other charter which was existing at the time of that judgment; it being also found that no final judgment was given; it may be asked, whether any thing else stated upon this record could put an end to that charter? I can find nothing else which by any mode of argument, or intendment, could have such an effect, except the acceptance of the subsequent charter of Charles II.

Then it becomes a question, whether the acceptance of a subsequent charter can put an end to the prior corporation? and I think your lordships will find, that in whatever way the charter of Charles II. could be considered, it could not put an end to the prior corporation. The charter of Charles II. must be considered either as granted to the *same* body of men, already incorporated by the charter of Henry VII. or to a *different* body.

If it were now contended, that the charter of Charles put an end to that of Henry, by being granted to the *same* body, it must then be admitted that a *corporation* existed, capable of taking a grant at the time of the latter charter, otherwise the principle of the acceptance of a subsequent charter cannot apply; for the acceptance of a charter by one body of men, can never affect a charter possessed by a different body of men.

But if it be said that the charter of Charles II. which does incorporate by the same name, was in fact, or is in consideration of law, taken to be granted to the existing corporation, then I have a right to assert that there is no acceptance of that charter found upon this record; for the issue that finds the acceptance of that charter finds *not* that it was accepted by the *mayor and citizens of Chester* (the existing corporators at that time) but by the *citizens and inhabitants* of Chester.

I believe, upon the first trial of this cause, the issue of the acceptance of the charter was very correctly understood; for it was then stated, in the legal construction, to mean, whether it was accepted by the only people who *could accept it in point of law*? that is, by the *mayor and citizens* of Chester. So stated, every fact was against it. The non-acceptance followed of course, and was found; but as it came again to the jury upon the record, as it now stands; whether accepted by the *citizens and inhabitants*, as a distinct body from the *mayor and citizens*, under the charter of Henry VII. and that acceptance being found, it would be too late now to contend that it is an acceptance by the former body, or to say that it shall vary any right that body had before; for it was accepted by the citizens and inhabitants of Chester, as a body distinct from the corporation that had before existed, under the charter of Henry VII. That acceptance can never bind those who had any rights under the

charter of Henry VII. so that it can never come within the principle of a subsequent acceptance by the already existing corporation.

But I will state further, not only that no such acceptance could have made this charter good, but that it is void in its first grant; for your lordships observe, that if in this charter of Charles II. by "citizens and inhabitants," are meant, the existing corporation in Chester, there is a reservation which the king had no power to make; for the king does not grant to *all* the citizens and inhabitants, but to the citizens and inhabitants of Chester, *with the exception of eight persons, by name*. Now here the king has, by his own authority, without quo warranto—without information—without any legal process—without the allegation of any one cause of forfeiture—taken upon him, by his own act, by his letters patent and prerogative, singly, to disfranchise eight members of that corporation; and, I believe, I need not bestow much argument to prove that to be a power which the law does not give the crown.

Before I proceed to consider the charter of Charles II. as granted to *another* body, I shall stop a little to take notice of an objection stated to the form of the defendant's plea; and I cannot help considering that objection as infinitely more weighty, in point of effect, than the others; because the defendant, in this record, is to stand by his own strength, and not by any defect of pleading on the part of the prosecutor.

It is not incumbent upon the plaintiff, in quo warranto, to make any one allegation in order to support his prosecution, but, in general, that the defendant has usurped; which calls upon him to shew by what title he claims; if, therefore, the defendant fails in shewing that, the prosecutor need do nothing more to entitle him to the judgment of the court,

It clearly appears, that the defendant, in his plea, upon the face of it, and unconnected even with any other part of the pleadings, has not stated a sufficient title in himself. For, supposing Charles II. had a power to grant a charter of incorporation, at the time and under all the circumstances, and that he actually did make such a grant; there is no averment to shew that the corporate franchise of being an alderman, has under that charter been duly continued, and handed down to the defendant; because he has not averred in that plea the existence of those integral parts of the corporation, the actual existence and activity of which were necessary to constitute any future aldermen.

It is averred, that the king having declared what officers there *should be* in the corporation—(and taken as a new charter of incorporation, we are to suppose, that there were then no officers existing in the corporation, or in truth no corporation at all)—he either *gives them existence*, or means must be provided in which they can derive their existence, from something which the king does create and put in motion.

He directs in future how the succession of mayor, aldermen, and common-councilmen, respectively (particularly that of aldermen, which is the immediate question here) should be preserved; that it *shall be* kept up, by repeated elections, from time to time, and directs by whom those elections shall be made, and out of what body. Then it seems incumbent upon the person who means to claim title under such an election, to shew, that there *once*, at least, *existed* both the body who were to elect, and the body out of whom the election was to be made. I submit to your lordships, that *the defendant has shewn neither the one nor the other*; for the election is to be made by the mayor, aldermen, and common-council, out of the common-council; in order, therefore, to shew a good title upon the face of this plea, the defendant should have stated (there being at the time of the charter of Charles II. no mayor, no aldermen; no common-council, for that is emphatically the ground upon which he has rested throughout) that the king did give existence to all those officers, the existence of which was necessary to give the power of continuing the corporation.

Now he has only stated that the king appointed twenty-four persons, therein named, to be the new and modern aldermen of the city of Chester; but he has
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not stated that the king appointed any *mayor*—that the king appointed any *common-council*; there is nothing, therefore, in the plea of the defendant, from whence your lordships can infer that a mayor and a common-council existed after that charter; for it is incumbent upon him to shew, that at the hour of granting that charter, no mayor and common-council existed; if there did not, it is not stated that the king nominated any mayor or common-council. I confess, that upon considering this objection, since it was started in the course of the argument, it strikes me as being of very great weight; and I ought to state to the house and my client, some apology for not having myself made it at the outset.

The best apology in these cases is the truth—we were so confident of our ground upon the general, legal merits of this case, that we were extremely desirous of having the judgment of the house, upon those general, legal merits, which should inform the citizens of Chester upon what constitution they really were to stand in future; which should inform the kingdom at large, to what sources of authority they were to look for the establishment of their corporate rights; which should satisfy the people, whether these charters, granted in the moment of despotism, and for the worst of purposes—built and established upon the ruins of all the corporate franchises in the kingdom, were *now* to be revived, near a century after the period from which, to the present hour, they have lain dormant; whether they were now to have legal effect given them, and all the corporations of the kingdom to be new modelled? *that* was the question upon which we, strongly relying upon the authorities in the law books, strongly relying upon the facts in the case, were desirous of having the opinion and judgment of your lordships; we therefore were not very anxious and solicitous to gain a judgment founded upon any other ground. But your lordships must decide according to the law upon the record.

It, therefore, only remains for me to state (and I shall endeavour to do it as shortly as I can) the remaining grounds upon which it appears to me perfectly clear and decisive, that in no point of view in which this case can be considered, Mr. Amery can support the title he has stated on his plea.

I have, in the former part of my argument, proved to your lordships, by many and respectable authorities, applied to the facts in this record, that down to the moment of granting the charter of Charles II. there was an existing corporation in Chester; I care not of what rights possessed, nor in what mode it had its existence.

If there *was* such an existing corporation, the charter of Charles II. was wholly void; in whatever point of view it is considered, and I have already proved it to be so, on the supposition of its being granted to the *then existing* corporation.

If we suppose it to be granted to *another* body, then, my lords, I have very little difficulty indeed in proving it to be void; for if you establish that there was a corporation existing in Chester on the day of the date of that charter, and if that charter is granted to another body in the same place, I am warranted by all the authorities in the books to assert (and it has never yet been attempted to be denied—I will venture to say, that it never will be denied by any lawyer) that there cannot be a new charter of incorporation granted for similar purposes, to a different body, where a corporation already exists.

I know no third supposition to put with respect to the objects of the charter; I know no other alternative to take, but that either it is granted to the same or to a different body. If the ingenuity of my learned friends can find any other, I shall be much obliged to them for the information.

I shall further state to the house, because I wish to cut up every ground upon which the defendant's case can stand, that even if this charter were not void, with respect to the persons to whom it was granted, it was void with respect to the subject-matter of the grant itself.

I conceive it is void, because of the reservation of a power which, in every way of construing it that has yet been attempted, appears to me perfectly unwarranted by law. I mean the power of amotion of the corporate officers, named in the clause,

charter of Henry VII. so that it can never come within the principle of a subsequent acceptance by the already existing corporation.

But I will state further, not only that no such acceptance could have made this charter good, but that it is void in its first grant; for your lordships observe, that if in this charter of Charles II. by "citizens and inhabitants," are meant, the existing corporation in Chester, there is a reservation which the king had no power to make; for the king does not grant to *all* the citizens and inhabitants, but to the citizens and inhabitants of Chester, *with the exception of eight persons, by name*. Now here the king has, by his own authority, without quo warranto—without information—without any legal process—without the allegation of any one cause of forfeiture—taken upon him, by his own act, by his letters patent and prerogative, singly, to disfranchise eight members of that corporation; and, I believe, I need not bestow much argument to prove that to be a power which the law does not give the crown.

Before I proceed to consider the charter of Charles II. as granted to *another* body, I shall stop a little to take notice of an objection stated to the form of the defendant's plea; and I cannot help considering that objection as infinitely more weighty, in point of effect, than the others; because the defendant, in this record, is to stand by his own strength, and not by any defect of pleading on the part of the prosecutor.

It is not incumbent upon the plaintiff, in quo warranto, to make any one allegation in order to support his prosecution, but, in general, that the defendant has usurped; which calls upon him to shew by what title he claims; if, therefore, the defendant fails in shewing that, the prosecutor need do nothing more to entitle him to the judgment of the court,

It clearly appears, that the defendant, in his plea, upon the face of it, and unconnected even with any other part of the pleadings, has not stated a sufficient title in himself. For, supposing Charles II. had a power to grant a charter of incorporation, at the time and under all the circumstances, and that he actually did make such a grant; there is no averment to shew that the corporate franchise of being an alderman, has under that charter been duly continued, and handed down to the defendant; because he has not averred in that plea the existence of those integral parts of the corporation, the actual existence and activity of which were necessary to constitute any future aldermen.

It is averred, that the king having declared what officers there *should be* in the corporation—(and taken as a new charter of incorporation, we are to suppose, that there were then no officers existing in the corporation, or in truth no corporation at all)—he either *gives them existence*, or means must be provided in which they can derive their existence, from something which the king does create and put in motion.

He directs in future how the succession of mayor, aldermen, and common-councilmen, respectively (particularly that of aldermen, which is the immediate question here) should be preserved; that it *shall be* kept up, by repeated elections, from time to time, and directs by whom those elections shall be made, and out of what body. Then it seems incumbent upon the person who means to claim title under such an election, to shew, that there *once*, at least, *existed* both the body who were to elect, and the body out of whom the election was to be made. I submit to your lordships, that *the defendant has shewn neither the one nor the other*; for the election is to be made by the mayor, aldermen, and common-council, out of the common-council; in order, therefore, to shew a good title upon the face of this plea, the defendant should have stated (there being at the time of the charter of Charles II. no mayor, no aldermen, no common-council, for that is emphatically the ground upon which he has rested throughout) that the king did give existence to all those officers, the existence of which was necessary to give the power of continuing the corporation.

Now he has only stated that the king appointed twenty-four persons, therein named, to be the new and modern aldermen of the city of Chester; but he has

not stated that the king appointed any *mayor*—that the king appointed any *common-council*; there is nothing, therefore, in the plea of the defendant, from whence your lordships can infer that a mayor and a common-council existed after that charter; for it is incumbent upon him to shew, that at the hour of granting that charter, no mayor and common-council existed; if there did not, it is not stated that the king nominated any mayor or common-council. I confess, that upon considering this objection, since it was started in the course of the argument, it strikes me as being of very great weight; and I ought to state to the house and my client, some apology for not having myself made it at the outset.

The best apology in these cases is the truth—we were so confident of our ground upon the general, legal merits of this case, that we were extremely desirous of having the judgment of the house, upon those general, legal merits, which should inform the citizens of Chester upon what constitution they really were to stand in future; which should inform the kingdom at large, to what sources of authority they were to look for the establishment of their corporate rights; which should satisfy the people, whether these charters, granted in the moment of despotism, and for the worst of purposes—built and established upon the ruins of all the corporate franchises in the kingdom, were *now* to be revived, near a century after the period from which, to the present hour, they have lain dormant; whether they were now to have legal effect given them, and all the corporations of the kingdom to be new modelled? *that* was the question upon which we, strongly relying upon the authorities in the law books, strongly relying upon the facts in the case, were desirous of having the opinion and judgment of your lordships; we therefore were not very anxious and solicitous to gain a judgment founded upon any other ground. But your lordships must decide according to the law upon the record.

It, therefore, only remains for me to state (and I shall endeavour to do it as shortly as I can) the remaining grounds upon which it appears to me perfectly clear and decisive, that in no point of view in which this case can be considered, Mr. Amery can support the title he has stated on his plea.

I have, in the former part of my argument, proved to your lordships, by many and respectable authorities, applied to the facts in this record, that down to the moment of granting the charter of Charles II. there was an existing corporation in Chester; I care not of what rights possessed, nor in what mode it had its existence.

If there *was* such an existing corporation, the charter of Charles II. was wholly void; in whatever point of view it is considered, and I have already proved it to be so, on the supposition of its being granted to the *then existing* corporation.

If we suppose it to be granted to *another* body, then, my lords, I have very little difficulty indeed in proving it to be void; for if you establish that there was a corporation existing in Chester on the day of the date of that charter, and if that charter is granted to another body in the same place, I am warranted by all the authorities in the books to assert (and it has never yet been attempted to be denied—I will venture to say, that it never will be denied by any lawyer) that there cannot be a new charter of incorporation granted for similar purposes, to a different body, where a corporation already exists.

I know no third supposition to put with respect to the objects of the charter; I know no other alternative to take, but that either it is granted to the same or to a different body. If the ingenuity of my learned friends can find any other, I shall be much obliged to them for the information.

I shall further state to the house, because I wish to cut up every ground upon which the defendant's case can stand, that even if this charter were not void, with respect to the persons to whom it was granted, it was void with respect to the subject-matter of the grant itself.

I conceive it is void, because of the reservation of a power which, in every way of construing it that has yet been attempted, appears to me perfectly unwarranted by law. I mean the power of amotion of the corporate officers, named in the clause,

clause, which reserves that power. I am afraid it will be necessary to point out the different constructions that have been attempted to be put upon this part of the charter.

We have contended, that by the natural construction, and by the (as I think) irresistible operation of that power, if exercised, the king does in effect, though not in terms, reserve to himself a power of dissolving the corporation by his own will and pleasure, without information—without cause of forfeiture alledged; for, as I conceive, it amounts, in effect, though not in terms, to a full power to remove all the acting constituent members of this corporation, who can continue its existence; for upon comparing the power of amotion, as stated upon this record, with the appointment of officers, by the charter, your lordships will find, that the framers of it have been so desirous of making this power as extensive as words could make it, that they have, in this clause, descended to an enumeration of every one of the officers existing in the corporation;—the mayor—the sheriffs—the recorder—the town-clerk—the murengers—leave-lookers;—without tiring your lordships with the recapitulation, they detail every one, I can venture to say, of the officers which were directed to exist by the charter.

The king reserves a *distinct* power of removing *each* of these officers; he reserves also a power of removing *one or more* of the aldermen or common-council; so that there is no one description of an integral part of this corporation, which can perpetuate its existence, to which this power, in the terms of it, does not extend.

I therefore contend, that the power which extends to the removal of *each*, extends to the removal of *all*; for it would be extremely difficult for those who contend for a different construction, to draw the line, and say where the exercise of this power of amotion shall stop. If it is asked (supposing for a moment the power of amotion to be good) has the king reserved a power of amoving the mayor? it must be answered in the affirmative. If it should be asked, has he reserved the power of amoving the recorder, the sheriffs, the town-clerk? it must be answered in the affirmative. If it should be asked, has he reserved a power of amoving *any* of the aldermen or common-council? no other answer can be given but in the affirmative. Then upon what ground can it be said that he shall not remove the mayor and the sheriffs? that he shall not at the same time remove both the recorder and the town-clerk?

Can it be said, if he has a right to remove *one* alderman, that he shall not remove *two*? I am sure the very terms of the charter are expressly against that, for it is indefinite as to the number, but it is clearly *plural*. No doubt, therefore, the king has reserved (if he could, reserve it) a power of removing *more than one* of the aldermen and common-council; where then shall we stop? Suppose the king, on the same day, in execution of this power, was to issue an order of removal against A. another against B. another against C. and so through all the twenty-four letters, which exactly answer to the twenty-four aldermen of Chester; supposing the power to be good at all, what court can take upon them to say, which of these aldermen shall *not* be removed?

Could the court say, that B. shall not be removed, because the king, upon the same day, has removed A? that C. shall not be removed, because he has removed both A. and B? How, therefore, is it possible to stop? or which of these orders shall be held void? they are concurrent orders; there is no priority of date; nothing that can determine *which* shall not take effect.

I should like to know what ingenuity can give effect to *any* of these orders, that will not give effect to *all*? the power is, therefore, either wholly nugatory, or it enables the crown to remove an integral part of the corporation, and by that means to defeat its power to continue its own existence. If that would be the effect of so many separate orders of removal, can it be said the king's order, which reserves the power of removing one or more, shall be void, if *two or more* persons are included in the *same* order? Shall it be void, therefore, for five? for ten? for what number?

and

and where shall the power of the king stop? and what court shall say, this order shall be void, because the king has included so many in it?

It seems to me that no sound construction can be adopted so as to give any actual effect to this power, which will not go the whole length of giving it an effect which is too monstrous to be supported. This limit, perhaps, may be contended for, that as there is a power given to elect others in the place of those removed, the king shall remove only so many as will leave a sufficient number to elect others in their place.

Now the absurdity of that will appear when you try it by the operation of different orders. It may be contended there must be a majority of each body, at least there must be a majority of aldermen; there must be a majority of common-councilmen; and, therefore, that the king shall not, at once, and without waiting for an election, remove a majority of those bodies, so as to prevent the power of their continuance. But if the king cannot remove thirteen, which is a majority of twenty-four, but may remove eleven, and twenty-four orders are issued at the same time, how can it possibly be said which eleven shall be turned out and disfranchised by that order, and which thirteen remain? The same might be argued of the common-council. (See p. 272.)

There is no way of putting this order, so as to make the execution of it *de facto* practicable, which will not involve the monstrous absurdity of the king granting a corporation in perpetuity, and reserving to himself a power to dissolve, and put an end to that very corporation he had so created. In this way, therefore, of considering it, it seems, if we construe the power in the only way in which it appears to me that it can be effectively construed, it cannot admit of a doubt but that such a power would be contrary to law. I have already stated authorities to shew, that the king, by his prerogative, cannot put an end to the existence of a corporation. I need only state some authorities to shew that the king, by his prerogative, and by his letters patent, cannot alter the general course of the common law of the kingdom. I conceive the general course of the common law of the kingdom to be clear and indisputable; that a corporation once duly created, shall continue its existence; I say so as not to be dissolved by any judgment whatever, or by surrender; but it will be granted to me, thus far at least, that it is the law of the kingdom that it shall continue its existence till that existence shall be determined by some legal process, or legal means. Then it follows decisively, that the reservation of that power is contrary to law. It is stated under title *Prerogative*, in 2 *Roll. Abr.* 164, in distinct terms, and cases put, and instances given, to shew, that the king, by his prerogative, cannot alter the course of law, even with respect to persons who shall be willing to take a grant. In the first placito, under that title, it is stated, that the king cannot alter the course of descent; he cannot grant to any persons (however willing they may be to take the grant) in a manner different from the rules of law.

The next placito states, that he cannot grant, by charter, that lands shall be deviseable, or that they shall descend to a sole heir, where, by the common law, the descent was different.

The fourth placito states, that the king cannot grant to a man, that he shall hold his lands after his entry into religion, because that is contrary to the common law of the land, and the heir is disinheritable by his entry into religion.

It is stated in placito eight, that the king cannot grant to another to hold pleas according to the course of the civil law, for the king cannot alter the law; and where such a grant was made to the University of Oxford, it was held void by all the justices of England.

It is stated in placito ten, that the king cannot grant that the council of York shall hold plea by English bill, upon an obligation or matter triable at common law, for he cannot alter the law which is the inheritance of every man.

It, therefore, distinctly appears, that the principle of law is the same, with the principle of sound policy and constitutional doctrine, that the king, by his prerogative, cannot alter the general law of the land, however willing any particular denomination of his subjects may be to conspire with him (if I may so use the expression).

pression) to that purpose, and to accept of a grant contrary to the law, yet the law will not permit any such grant to take effect.

The same doctrine is laid down by lord Coke, in his 2 *Inst.* page 282, in his reading on the statute of Gloucester, in his comment upon the words, "that they shall not be held to answer without original writ;" "here," says my lord Coke, "is an antient maxim in the law implied, that regularly no man ought to answer for his freehold, franchise, or other thing, without original writ *secundum legem terre*; any statutes to that effect are but declarations of the antient common law, as here it is to be seen in the case of franchises in the king's own case." (See p. 301.)

I flatter myself that I needed not to have stated any authorities to prove the proposition for which I am now contending, when I recollect to whom I have the honour of addressing myself. I believe the principle that the prerogative of the crown cannot extend to alter the law of the land; that no grant, contrary to that law, can be made good by the crown, or even by the acceptance of those to whom it is granted—I am sure that principle is too deeply engraven upon the hearts of every one of your lordships, who hear me, to make it necessary for me to trouble you with my observations upon it at all, and I should make an apology for doing so.

I shall only trouble your lordships with one or two authorities, as to an application of that principle, to the present case:—I conceive it is beyond all doubt, that this clause of amotion, in any way of construing it, is void; for even supposing it to amount to a power of amoving only the minority, it still would enable the king, by his own letters patent, to disfranchise any number short of a majority, without ground of complaint, and without legal process; *that*, though less contradictory in its effect to common sense, and less alarming at the moment, is yet equally contrary to the principles of law. For even if the king were to turn out *one individual*, without legal grounds of forfeiture, by his own order of amoval, it is impossible, in my apprehension, for imagination to frame an argument which can support this as a legal power reserved in the charter of Charles II.

Then I am to contend, that if this power be illegal and void, the whole charter is void in consequence of it. I am aware, that in the grant of a common person, the law is otherwise; if a common person make a grant upon a void condition, the grant shall enure, discharged of the condition; but your lordships know, that with regard to the crown, it is otherwise; that, if the king shall be deceived in his grant; if he mistakes either the law or the fact, in that grant, the *whole* is void; and it shall not be in the power of the grantee to say, "I will take that from the king which he meant to couple with a condition; that condition cannot take effect, therefore I will take the thing without the condition;" the king never meant to grant, unless that condition took effect, and that not taking effect, he never meant to grant at all.

I will not trouble your lordships with doing more than referring to the authorities in the books, 1 *Rep.* 48. *Hob.* 223. Your lordships will find that they support the distinction between the grant of the king, and the grant of a common person; and they support the proposition in this extent, that if the king is deceived in his grant, either in fact or in law (for there may be a distinction in that also) if the grant cannot operate according to the king's intention, it is void *in toto*.

I shall content myself, upon this part of the case (*see p.* 304.) with stating another principle. As the king is not bound by the grant, if it contains any thing that cannot take effect, for that the whole charter must operate or none of it, so in the case of a new charter of incorporation (which this of Charles II. is contended on the opposite side to be) the persons to whom it is granted, must have accepted or rejected the *whole*; I shall state but one authority to that—3 *Burr.* 1656. "There is a vast difference," (says lord Mansfield) "between a new charter granted to a new corporation (*who must take it as it is given*) and a new charter given to a corporation already in being, and acting either under a former charter or prescriptive usage."

My

My lords, I therefore contend that this power of amotion is void of itself, whether it be considered as a power to amove *all* the corporation, or only a *few individuals* of it; that if it had been a power to amove only *one* individual of that corporation, it would be void in point of law; that moreover the corporation must accept or reject the whole, and the whole is void if the whole cannot take effect; I have, therefore, contended, that the corporation of Charles II. under which Mr. Amery alone claims title, is void in respect of the persons to whom granted; or that if good in respect of the persons to whom granted, it is void in respect of the matter which it contains. I have only one supposition further to contend with upon this head, and that is a supposition which, I confess, I am unwilling to state, even for the sake of arguing upon it; it is so subversive of those principles upon which the whole condition of the kingdom depends; I mean the supposition for a moment, that this power of amotion could be good, and could be supported.

I adopt that supposition merely for the sake of shewing, that whatever arguments may be used, they will all equally fail when they come to the conclusion of supporting the title of Mr. Amery. If that which I strongly protest against, which I have all along been arguing against, should prevail; so far from its hurting my client (I do think it will deeply hurt the law of England) but so far from hurting the prosecution in this cause, it makes an end of the defendant's title altogether; for if, for a moment, we suppose that the power of amotion, reserved by the charter of Charles II. is good, it *has been exercised in its full extent*, and the corporation is put an end to; if the power is bad, it vitiates the charter, and in neither of these cases is there a subsisting corporation, under the charter of Charles II. As there is an end of the title of Mr. Amery, if it could possibly be your lordships' opinion that the constituent parts of the corporation of Charles II. have been removed by lawful authority (I mean by the order of council of king James II.) so I farther contend, that the same conclusion will follow as against the title of Mr. Amery, whether they are removed by lawful authority or not.

If, therefore, it appears in this record, that, under pretence of this order of amotion, the mayor, aldermen, and common-council, or I will state the aldermen and common-council only; if it appears, that, in consequence of this supposed order of amotion, and under pretence of it, the aldermen and common-council of the city of Chester, were, on the day mentioned in this record, *de facto* removed, it is perfectly indifferent as to the conclusion to be drawn in this case, whether that was lawful or not, *because it is not stated that they ever again acted or came into existence.*

Now I will prove to your lordships, that it is fully stated upon this record, that they were *de facto* removed; it is stated, that on the twelfth of August, 1688, certain persons, by name, were then aldermen of the city of Chester; it recites twenty-four, and it does not leave it to your lordships' inference, from any recital; but it states further, that there was no other alderman of the said city of Chester at that time. It then proceeds to state forty other names; that those gentlemen, by name, were all of them common-council-men, and that there were no other common-council-men; then it proceeds to state, that king James II. by his order in privy council, made in execution of the power reserved by the late king Charles, did order, that the said Hugh Starkey, and the others, and the said Richard Leving, esquire, recorder, aldermen, and justices of the peace (it enumerates *all* the officers of the corporation) the aldermen and common-council-men, should be—and there it might have stopped if it stated only the order itself—but it goes on further, and says, and they *were thereby removed and displaced* from their aforesaid offices and employments in the said city of Chester; and then it states, that the said order in council, under the seal, was signified to them, and thereby they and each of them, severally and respectively, became and were moved from their respective offices; and, therefore, the power of election ceased.

Now if they *were* removed from their places, what signifies, in point of law, *how* they were removed? If all the aldermen, and all the common-council-men,

were in fact, on the 12th of August, 1688, removed from their places, let my learned friends shew what fact is stated on this record to revive and give them a future existence, *pursuant to the charter of Charles II.* There is no such fact stated.

How is it possible then to contend, that the power of election remained, when every one of the aldermen, and every one of the common-council, out of whom the election was to be made, and who were to join them in that election; were, in fact, displaced and removed, on the twelfth of August, 1688? If, however, all the reasons I have hitherto given should fail, and your lordships should be of opinion, that there was no subsisting corporation, in point of law, in Chester, at the time of granting the charter of Charles II. that that charter was directed to persons competent to accept it; that it was good, as to the subject-matter of the grant; that the power of motion was bad, and that no act was done in pursuance of that power of motion, which could have, or had, any effect:—Supposing your lordships to go all the length of saying, that on the twenty-sixth of October, 1688, subsequent to this actual removal, which is so stated on the twelfth of August, there still subsisted a full and entire corporation, capable of acting and of continuing its elective power; and that on the twenty-sixth of October, in the same year (which was the date of the charter of James II.) there was a subsisting corporation under the charter of Charles II. yet it still appears upon this record, that Mr. Amery could have no title under it, and that that charter does not now exist, because the charter of confirmation and restoration of James II. is directed to the *mayor and citizens* of Chester.

Will my learned friends contend—will it lie in their mouths to say—that there was any other mayor and citizens of Chester, at that time, except those that were incorporated by Charles II? The whole of their argument has gone the direct contrary way; every part of this cause, from its first litigation to this moment, has, on their part, gone upon the supposition, that there were no mayor and citizens of Chester existing, except those created by the charter of Charles II.

I have not forgotten the emphatical words of my friend on my left hand, when this first became the subject of dispute: “The whole corporate capacity was done away—there was no mayor—there were no aldermen—there were no common-council men—sheriffs”—(and, with a rapidity of enumeration, my learned friend ran through the whole) “there was no freeman—no person who had a corporate existence in the city of Chester, except those who were created by the charter of Charles II.”

If that be so, the charter of James is directed to the mayor and citizens of Chester, and it stands now upon record, that the mayor and citizens did accept the charter of James; then the provisions of the charter of Charles II. are gone by the charter of James; they have not averred that any subsequent act was done to invalidate the charter of James; and if the charter of James was in fact directed to the body incorporated by the charter of Charles II. the charter of James is the subsisting charter.

So that, whether the charter of Henry VII subsisted, or the charter of Elizabeth subsisted, down to the granting the charter of Charles II. or whether they were done away, and the latter was ever so legally established; still, upon this record, it appears to your lordships, that the charter of James II. is the subsisting charter of the corporation of Chester. The universal understanding of all mankind has gone along with this argument; from the time when this restoring charter was granted to the city of Chester, that of Charles II. has, till this present moment, lain a dead letter in the corporation-chest.

I am not meaning to travel out of the record, and state facts to your lordships—I am not at liberty to do; but I can state to your lordships, from authorities in the books of law, from judicial declarations, what will shew your lordships that the idea of the charter of Charles II. subsisting, at least since the granting of that of James, was never entertained till the day of the judgment that we have appealed against; for your lordships will find the corporation of Chester themselves, at periods far

nearer

nearer the time of granting this charter; at periods when they best knew what charters they had accepted and acted upon, excluding the charter of Charles II. and denying it to be their constitution.

Your lordships will find, that very soon after the granting of this charter, a quo warranto was filed against the corporation of Chester (it is reported in *Comberbach*, 307) it was in the sixth of William and Mary; your lordships see that was a period soon following the granting of these respective charters. To that quo warranto the constitution returned by the corporation, was the charter of Henry VII. as confirmed by James II.

Your lordships will find, therefore, that so early as that, they had no idea of setting up the charter of Charles II. themselves; they who best knew under what they acted, never fancied that they were acting under the charter of Charles II. Your lordships will find, that at a more advanced period, but still a distant period from this, and much nearer the date of this charter (in the year 1733) another information in quo warranto was filed against the corporation of Chester; and that was in the case of the *King v. Johnson*; that case is reported. And there is in the possession of one of the officers of the Crown-office, a very accurate, full manuscript report of that case, by Mr. Matterman, who, at that time, was master of the Crown-office; it is now at your lordships' bar, and a fuller and more accurate report of that case than any in print; it is also from the best authority, from the master of the Crown-office, who was in possession of the records, who states distinctly every fact in the case.

Your lordships will see, that there an attempt was made to set up this extraordinary charter of Charles II. for upon a rule to shew cause why an information should not be granted, they did state, that there was such a charter in existence; it crept out of the corporation-chest then, for the first time, and they ventured to hint to the court, that there was such a thing. But it met with such a reception from the learned judges who then presided in the court of *King's-bench*, that from that moment to the present occasion, it has never dared to face the light.

It was treated in such a manner by lord Hardwicke, and the judges of that time, that notwithstanding upon the allegation (on the rule to shew cause) of the existence of that charter, pursuant to the mode prescribed by which Johnson had been elected, the rule for an information was made absolute; an information in quo warranto was granted against Johnson, and he pleaded to it; but he did not dare to plead the charter of Charles II. after the manner in which it had been treated by the court; on the contrary, he had recourse to an old bye-law made under the charter of Henry VII. himself stating in his plea the charter of Henry VII. to be the subsisting charter of Chester; he had recourse to an old bye-law made under that charter, upon which an issue was taken, and that issue found for the defendant.

The reason was obvious why your lordships have not had the same plea here; that bye-law was as much a nullity as the charter of Charles II.—so clearly a nullity, that my friends who have now the conduct of the corporation of Chester, were too good lawyers to advise any body to rest their title upon that bye-law. Whether they have rested it upon any better title, your lordships' judgment will ultimately determine; but as the last attempt to support the usurpation of this mode of election in a select body of the corporation of Chester, they have once more ventured to have recourse to this dormant and reprobated charter of Charles II.

My lords, I trust that the final decision of this cause, will teach them, that from such an exercise of the prerogative of the crown, no rights can be derived—that no rights can be subverted—and that the ancient privileges of the many corporations in the kingdom, who claim by prescription, or by ancient charters, will not now again be set afloat, by a decision, that the charters granted by Charles II. upon his judgments in quo warranto, were good in point of law, and extinguished all their former rights.

Lord Chancellor. Where is that case reported of the *King v. Johnson*?

Mr. Serjeant *Adair*. It is printed in *Barnardiston*; but the best report is the the manuscript note of Mr. Maisterman, who was master of the Crown-office.

Lord Chancellor. What were the objections that he stated to the charter? because, I suppose, you produce this case as an authority in support of the objections that you have mentioned before to the legality of the charter.

Mr. Serjeant *Adair*. I adduce this case as judicial evidence (if I may be permitted to make use of the expression) to your lordships, that the charter of Charles II. has never, from the time of granting it, been considered either by the corporation of Chester, or the courts of law.

Lord Chancellor. I wish you would give yourself the trouble of shewing how we can receive judicial evidence.

Mr. Serjeant *Adair*. By having recourse to that source from whence your lordships receive the opinions of former judges.

Lord Chancellor. Certainly, as to an opinion in law; and, therefore, I wish you to tell me what the objections in point of law were; you cannot introduce objections upon this record, by reciting former records.

Mr. Serjeant *Adair*. Your lordships can see, from former records, what the course of pleading has been; and when you are considering the franchise of the corporation of Chester, upon what they have founded their subsisting rights, your lordships will also find in the report of that case, that lord Hardwicke considered the judgment of seizure, upon sir Robert Sawyer's information, as illegal, and declared this opinion—that it was the duty of the court to resist, as far as possible, every attempt to establish the charters given by Charles II. and that it could not be established by any thing short of proof that it had been uniformly acted upon ever since. That opinion your lordships will find lord Hardwicke declaring, in the note of that case; it is the case of the King *v.* sir Watkin Williams Wynne, in *Barnardiston*. There were three or four informations by different names. Maisterman's report is of the King *v.* Johnson.

I think nothing remains—for I would not trespass upon your lordships' time, when I know that I shall leave whatever has been untouched in this argument in hands so much better, and more able, to explain it to your lordships. I will not now detain your lordships further than shortly to recapitulate the grounds on which it appears to me, in every imaginable way in which I can put this case, that the judgment must be for the plaintiff.

The first ground is, that there appears upon this record to have been a corporation legally existing in Chester long before the granting of the charter of Charles II. That there appears nothing upon this record, which can destroy the existence of that corporation; for that a corporation, once legally existing, cannot be destroyed either by the prerogative of the crown—by its own surrender—or by any judgment in a court of law.

That if its corporate capacity could be dissolved by any judgment of a court of law, it must be by a judgment of *ouster*, and not of *seizure* only. That if such a judgment of ouster, not only has not been given in this case, and is expressly negatived, but that such a judgment *could not*, according to law, have been given upon this information, because this is an information against the mayor and citizens, *in their corporate capacity*, against whom judgment of ouster cannot be given as to the franchise of *being* a corporation; and that proposition I have supported by an uniform chain of authorities, from the earliest found in our books, down to the case of sir James Smith, in which, as to that point, the opinion of all the judges was unanimous; that supposing, for a moment, a corporation could be dissolved by a judgment of seizure, and not a judgment of ouster, even such a final judgment of seizure into the king's hands, has not been given in this case; and that, by a judgment of seizure *quousque*, there is no *dictum* to be found, shewing that a corporation can be finally dissolved or seized, as forfeited.

Lord Chancellor. What do you state to be the effect of a judgment *quousque*?

Mr.

Mr. Serjeant *Adair*. I consider a judgment *quousque* to be merely a process to compel appearance; that the actual exercise of the functions of the corporation, their activity and energy, may be *suspended*, by a writ of seizure, into the king's hands, till they shall appear and replevy, in the language of the books: that judgment cannot be finally given for any default of appearance; that no final judgment has been, or could be, given upon this information, as to that subject; and, therefore, the general conclusion upon that part of the case is, that the old corporation of Chester did exist, as we have averred, at the time of the judgment *quousque*, and could not be dissolved by that judgment.

Lord Chancellor. If I take you right, the true point of your objection is, that there was no judgment of seizure; suppose the judgment *quousque* had been actually completed, as in your idea of law it might have been, or ought to have been, to have any effect, what would you then say was the effect of a judgment *quousque* enforced by a writ of seizure?

Mr. Serjeant *Adair*. I look upon it to have the effect of suspending.

Lord Chancellor. It would suspend the activity.

Mr. Serjeant *Adair*. Perhaps it might; but your lordships see in a moment that that might possibly afford an answer, if the information was now against somebody else than Mr. Amery, who claimed to be an alderman under the charter of Henry VII.

Lord Chancellor. I am not now urging the question, it is only for the sake of comprehending the force of your argument.

Mr. Serjeant *Adair*. I state then, that if that would afford any objection, it could only afford an objection to a title set up under the charter, which, at the utmost, could be suspended by the operation of that judgment.

Lord Chancellor. You admit, therefore, that a judgment *quousque*, attended with a writ of seizure, destroys—

Mr. Serjeant *Adair*. By no means, without a final judgment.

Lord Chancellor. How could a judgment which does not suspend the activity of the corporation, and is replevisable for ever, compel them to come in?

Mr. Serjeant *Adair*. In truth, that leads to a ground which I touched upon in the former course of the argument; which is this, that a judgment *quousque*, considered as a seizure of the corporation, though it is the proper process upon a writ of quo warranto, is not a proper process upon an *information* in quo warranto; for the distinction is expressly stated in *Siderfin*, 86, between a proceeding upon a writ of quo warranto and an *information in the nature of a quo warranto*.

Lord Chancellor. I remember your argument upon that.

Mr. Serjeant *Adair*. There are other arguments also to shew, that upon a writ of quo warranto, the judgment of seizure *quousque* is proper for want of appearance, but that upon an *information* in quo warranto, the process is by *venire* and *distringas*. Then your lordships know, that by repeated *distringas's* the appearance can be compelled; and your lordships see further, from the authority of the case of the year-book of Edward IV. (the case of the King *v.* Quadryng) that even after a judgment of seizure *quousque* the *distringas's* continued to issue to compel appearance; therefore your lordships see that the power of compelling appearance does not cease with the judgment *quousque*; and, therefore, the court does not lose its power, but on the contrary it is to proceed, by process, by distress infinite, by repeated *distringas's* to compel appearance; and then when that appearance is made, the court will decide whether final judgment is or not to follow the judgment *quousque*.

Lord Chancellor. I am perfectly aware of all the turns of your argument; I meant, merely, supposing this to be a process by distress infinite, and supposing the process to be intended to answer the purpose of compulsion, the difficulty I had was, how that process, which left the corporation in full activity, and which is replevisable for ever, could bring them in?

Mr. Serjeant *Adair*. In the case of the King *v.* Quadryng it was so, even upon a writ of quo warranto, which is stronger; for there, where the seizure is held to be proper,

proper, yet still your lordships find *distringas*'s issued after that judgment *quousque* that is evidenced by the record; therefore all that I meant to state in this stage of the business was, that I by no means admit that the consequence of seizure *quousque* goes to a total suspension of the functions of the corporation, till they shall be replevied. And your lordships will further do me the honour of recollecting a class of authorities which I stated distinctly for that purpose, to shew that even under a seizure the functions of a corporation were not wholly suspended; because I pointed out in the case of the seizure in the reign of Edward I. and in some others that I referred your lordships to in the former day's argument—instances where the corporation had acted even during the time that seizure remained in force, and while the corporation was in the hands of a *custos*, and held in the hands of the crown by that seizure: so that a great part of that argument was taken up to shew your lordships, that, in the utmost and in the strongest way of putting it, even the judgment *quousque*, so far from extinguishing the rights of the corporation, did not amount to a full suspension of all their active powers.

And I particularly instanced the case of a writ of right tried at the hustings at Guildhall, during the time of the seizure into the hands of Edward I. and a *custos* being appointed under the antient charter and usage of London. And your lordships will find innumerable other authorities, to shew that it does not even amount to a total actual suspension of their corporate functions.

Your lordships therefore see that no replevin is necessary to give activity to the corporation, because their corporate officers still remained in existence; and sir James Smith was held to continue an alderman, not merely after a judgment *quousque*, but after *final* seizure; and upon that point expressly it is, that the judgment in that case was given. If a dissolution cannot be the effect of a final judgment of seizure, much less *a fortiori* can it be the effect of a judgment *quousque*; for all those reasons, therefore, there was a corporation existing in the city of Chester at the time of, and after the judgment *quousque*, and not done away by that judgment. Your lordships see that, therefore, it was not in the power of Charles II. to grant a new charter of incorporation for general purposes in Chester, where there existed an old corporation; that the charter of Charles II. was void, as being granted in the manner I stated, whether granted to the old body, for the reason of disfranchising the eight persons named, or if granted to the new body, on the principle that there cannot be two corporations in the same place; that though it should be good as to that, it is void as to the subject matter and the nature of the grant itself; if the clause in the grant, which I have contended did avoid it, did not avoid it, that the power has been exercised and the corporation extinguished by the order of removal of James II. and then the power of election must cease and determine. That if they were neither in law nor in fact removed by the order of King James, still the charter of King James, being addressed to the corporation by its corporate name, as granted by Charles II. and accepted by them, makes an end of the charter of Charles II.

I beg pardon for having trespassed so much upon your lordships' time: I hope the magnitude of the question—the importance of it, not only to the city of Chester, but to the whole kingdom, and to the law of the country, will be some apology; and that your lordships will recollect that I have not thought my own opinion and my own arguments deserving your lordships' attention, but have chiefly relied upon the arguments and authorities of others; upon those reasons which appear too strong and cogent to be got over. But if it should appear to your lordships, as it has appeared to me on a thorough investigation, that no one authority is to be found to support a contrary proposition, I cannot entertain a doubt that these considerations will induce your lordships to reverse the judgment which has been given.

Adjourned.

The

The Honourable THOMAS ERSKINE.

THE observations I have to make upon the question before your lordships, however inferior they certainly will be to those which your lordships have already heard, derive a very peculiar advantage from the situation in which I stand : the record, which undoubtedly is very complicated and intricate, and which therefore embarrassed the argument very much in the outset of this business, is now perfectly familiar to your lordships : the various points of law which must arise upon the consideration of this record, have already been very perspicuously stated, and also the authorities noted for your lordships' future consideration.—So that the reasoning which I have to offer to your lordships, however feeble it may be, will have this advantage, that it will stand upon the strong foundation of what has been urged : that I shall not be under the necessity of wearying your lordships' attention and patience by long narratives and statements of the pleadings, but shall endeavour to come at once upon those different parts of the record, which I conceive will be the subject matter of the consideration of the house.

I shall therefore first of all beg the consideration of the house to what I call the *first set of pleadings*, by which I mean the information, the defendant's plea, the first replication to that plea, and the issue joined upon the record in consequence of those pleadings.

The first proposition I shall humbly lay down, and which I shall support by only one authority, is this:—that by that plea so pleaded, the defendant, Amery, must stand or fall; he must prevail by the validity of the election which he states, and can resort to nothing else. To maintain this proposition, I will state to your lordships the case of the King v. Leigh, mentioned by my learned friend, Mr. Serjeant Aldair, which is reported in 4 Burr. 2144, decided by the court of King's-bench, then full, and argued by one of your lordships then at the bar. Lord Mansfield asked if any cases could be cited where the crown was refused judgment upon an information in quo warranto, where the defendant failed in the title which he had set up upon the record? and it was acknowledged there was none; it follows, therefore, as a corollary from this proposition, that unless Mr. Amery can maintain that he was elected an alderman of the city of Chester, by the major part of the mayor, aldermen, and common-council of that corporation, in point of fact, and in point of law also, existing under the charter of Charles II. granted in the thirty-seventh

seventh year of his reign, which is his title upon the record—he fails, and the crown must have judgment.

I can, as counsel for the crown (if I may use such an expression) bring the whole record to a focus upon him, to consume the title which he pleads, while he can only stand upon the defensive, and maintain the narrow, naked title which he sets up in point of fact upon that record; and therefore, in order to shew your lordships how feeble a title, in my poor apprehension, this charter of Charles II. is, standing by itself, I desire (and that is for the benefit particularly of the defendant) that your lordships will for a moment forget, if you can, that there ever was a charter, such as is averred in the second replication, granted by Henry VII. and confirmed by Elizabeth.

I desire your lordships also for a moment to forget, if the charter of Charles II. was not repelled by the existence of an antecedent charter, that there ever was a restoring charter to renew this body, existing before the charter of Charles II. or supposing that its operations were crippled, and suspended by the judgment stated upon the second replication, still, I say, that taking the charter of Charles II. as pleaded upon this record, it is in itself a bad title, and that it must fall by the weakness that appears upon it.

The first replication, without questioning the existence of this charter of Charles II. sets out another part of it wholly omitted in the plea of the defendant; namely, the power of motion reserved to the king, by the express words of this charter, to remove the mayor—the aldermen—common-council—and so on; and then it concludes with an averment of fact, that on the 12th of August, 1688, king James II. by an order in council, signified to all the then existing officers, whose names are enumerated upon the record, removed them all (I do not state the express words of the record, which I shall come to by and by) “and that thereby the right of election ceased.”

To this replication, so put in, the defendant (protected as he is by the gentlemen who stand near me) did not demur, although upon the arguments that they must maintain to-day, in order, for a moment, to give colour or countenance to this charter, the most palpable demurrer presented itself in every shape upon the record; for whether, in point of law, the king could not reserve a power to remove all, or, in point of fact, the charter did not contain such a power (which the court of King's-bench have decided it did not) a demurrer in either case equally presented itself; for they mean to say, and they have contended with success (though I trust they have now got to the limits of that success) that the charter of Charles II. in point of fact only, reserved a right of removing *some*, leaving enough to elect; whereas we contend that the king reserved a power of removing *all*.

I know that does not alter the rule of law which is to govern your lordships' decision; but though it does not, it begets, in my opinion, matter of momentous consideration; for your lordships, who know the world, and who know the eminent characters who represent the defendant here, will see that this is a *new light* since the beginning of this cause; and as a new light founded upon no new fact, and supported by no new authority, is rather a creature of the imagination, than of the understanding, I trust it will make your lordships receive, with some distrust and caution, what is to be offered upon this subject. I ask nothing more from the observation than simply what I have stated. I beg pardon for any thing like a digression in a case of such length.

Then the defendant does not demur—the reserved power of motion in the words of the replication, is admitted—the number of officers upon the 12th of August, 1688, is admitted—the order in council to remove them all is also admitted. I mean to contend, by and by, that it is also admitted they were all removed *in fact*; and yet in the one case the defendant does not demur, and in the other he does not traverse; but that is a future consideration.

The only remaining fact in the replication is, the signification of this order, which is denied; but upon that there is an issue, and that issue is for the crown; so that the whole of the first replication stands entire for the king. The

The order of amotion, therefore, being admitted to have attached upon the authority of the then existing officers of the corporation, and the signification of it being found by the jury, it appears to me (I may be mistaken undoubtedly, but after long and painful consideration of the subject, it appears to me) that human reason can devise but two defences; and I mean to give my learned friends their choice. They can have but one of them.

They must say, that the power of amotion was never intended by the king, to extend to the destruction of the corporation, by the amotion of *all*; for as a re-election, within a reasonable time after amotion, is prescribed by the subsequent part of the charter, that power of re-election bridges and restrains the terms of the amoving clause, so as to cut it down to a power of amotion, consistently with the power of re-election; and that, therefore, your lordships are bound to consider this order of amotion as void, not being within the power, in fact, reserved by the king. That is one alternative.

The other is, That supposing your lordships are bound, as I am persuaded you are, to put the construction which I humbly put upon this charter, that the king has reserved, as he has in fact exercised, a power of total amotion; then they must say (if any man can say such a thing) that this amoving clause, which is incorporated in the body of the charter—which is the very essence of the charter—is to be void, and yet the charter is to be good!

To which I humbly reply two propositions, which will, I think, beget a dilemma so logically complete, that no ingenuity can possibly extricate the defendant from it.

The first proposition is this—That in construing this grant of the crown, your lordships cannot narrow the right which the king, in express terms, has not only reserved to himself, in plain, unequivocal terms, but which he has shown his intention to reserve by his act under the charter; which would be sufficient, in my humble opinion, to support the grant of a subject.

Secondly, If your lordships find that you cannot put any other construction than that the king really did intend to reserve, and by his charter actually did reserve, a power of amoving all; then, I say, the king was deceived in his grant, and the grant is void *in toto*.

The charter is either good or bad; if it be good, and if it means what I say it means, namely, that the king reserved the power of amoving you all, and that he did amove you all, then you are amoved; and as it does not appear by the record, that after you were amoved, you ever resumed your places in the corporation, the corporation was gone a century before the time that you state your election, in your plea.

If, on the other hand, to avoid the effect of that, you say, the king had not a power to amove you all—then the king was deceived in his grant; you have accepted that charter *in toto*, and you shall not take the part which you like, and reject the remainder; and for that I shall state various authorities, which I am persuaded will have proper effect upon your lordships.

With respect to the first proposition, I beg leave to take the words of the grant—his majesty reserves to himself, “at his free will and pleasure, the mayor, recorder, common-clerk, or any one or more of the aldermen” (without any limitation) “common-council-men, sheriffs, coroners, and justices of the peace, of the said city, for the time being, by any order of the said late king, his heirs, or successors, in privy council made, and under the seal of the said privy council, to them respectively signified, to amove and declare them, or any of them to be amoved accordingly.” Your lordships will have the goodness to attend to this expression—after having enumerated the mayor, aldermen, common-council, &c. every person having a civil existence in the corporation, he does not merely say, “to remove any of them,” but he says, after he has mentioned every one, taking them in the aggregate, “to remove them or any of them;” but that is not all, for, pursuing the words of this charter, it says, “that from thenceforth;” that is, after the signification

rification of this order, "the mayor, recorder, common-clerk, aldermen, and "common-council men, sheriffs, coroners, and justices of the peace, for the time "being" (sweeping the whole corporation) "and all or any of them so amoved, "and declared to be amoved from their respective offices, should, in deed and in "fact, and without any further process, actually, and to all intents and purposes "whatsoever, be amoved."

It appears to me, that the English language cannot more distinctly describe the reservation to be such as I contend; for instance, if any number of people were assembled in this room, and from the time I signified to them my pleasure, that they should go out—that all and any of them are instantly to be removed—and that any thing they do in the room after such signification, is void—I shall be glad to know where reason or language can fasten a limitation upon my power.

But they have said, that the concluding clause in the charter being repugnant to the former, therefore your lordships will give it such a construction, as that the whole may stand together; and that your lordships should make such a construction of this charter, as that there shall be no repugnancy. Now I contend, there is not the least colour for saying, that here is a repugnancy; if I understand repugnancy, it is this, that the two parts of an instrument cannot exist together.

The king reserved a power of removing those that displeased him, but he did not reserve a power of naming other persons in the stead of those so removed; and though the king knew when he reserved that power of amoving *all*, that he might have occasion to exercise it, yet *non constat*, that in every instance he might chuse to exercise it. He might be disposed to exercise a power of amotion *short of that*; of consequence then, it was necessary to state what the corporation were to do when his Majesty exercised a power short of the extinction of the corporation, and which left a capacity of election in them. He tells them, "you are to elect according to your charter." Then where is the repugnancy of this?

I have always understood a *repugnancy* to mean, that if the first part of the charter carries the construction I put upon it, there never can be a power of election; but if the king removed the mayor, they might chuse a mayor; if he removed one, two, three, of the aldermen, they might elect others in their stead. And thus your lordships may construe the charter, so that it may all stand together; and if the meaning of the charter be such as I have endeavoured to explain to your lordships, I am only to see whether I can bring into the argument any thing to confirm the language of the charter, as to what was the king's intention.

Now how is the intention of any person who is a party to a deed to be collected? particularly the king, when he is dealing out the great trusts of prerogative and power, which are not his own, but which are in trust for his people, and part of the government of the country. The law must protect the king, to see that he never shall part with any of the trusts reposed in him, without knowing minutely and accurately what he grants.

Then the king's intention is to be collected, in this instance, from what he did under this grant; the record states, that he removed *all*. The king can do no wrong; and you are not to conclude too hastily, that the king went beyond the power reposed in his grant.

I will state, with permission of the house, some authorities upon this head; namely, that the king's grant cannot operate *diverso intuitu* (*Vaughan*, 14.) but he shall be intended, in such cases, to be deceived; 2 *Roll. Rep.* 196, the king's grant shall not enure to any other intent than that which is precisely expressed in it. *Shep. Touch.* and *lord Chandos' case*, 6 *Rep.* 55, and *Moore*, 45, the king's grant shall not take effect contrary to his intent.

I have already remarked the strong principle upon which all these cases turn—your lordships very well know, that for this reason the king's prerogative can never be taken away by implication; if he is not named in an act, he is never bound by it; if he is not named in a judgment, he is not bound by the judgment. If the King's-bench, where the king sits, or any of his high courts, are not named in
any

any act of parliament, conferring new jurisdiction, they are not touched in their authorities.

The king has a great and an awful trust reposed in him for the preservation of government, and for carrying on the executive power of the country, and doing every thing of his certain knowledge and mere motion, as is stated in all his grants; he must know precisely what part of the prerogative of the crown he means to invest the subject with; he must know correctly the meaning of his grants. The subject can never come and say, "Your majesty thought you was granting me the contrary, but I will hold *this*;" that between man and man would be a sensible rule: a man who grants, must mind what it is he grants, and, if he is in his senses, the law will consider that he does so; but public magistrates, with respect to the trusts the country has vested in their hands, must be protected by the whole power and wisdom of the law, that nothing may go forth but what was intended by the grant.

The case of the King v. the University of Cambridge, decided by lord Mansfield, was this; that if the king grants to an existing corporation two things, which he *may* grant, and which he *intends* to grant, the corporation so existing may take one, and may reject the other; but that where A, B, C, D, E, F, are private men, and have no being or existence in the eye of the law, but the king chuses to incorporate them, the civil creature cannot say to the civil creator any more than the natural creature can to the natural creator, "that he will not be made thus;" he must take the original constitution of his nature, civil or natural, with all that belongs to it, good or bad; so it is that one must take one's nature with all the diseases that belong to it; but after I am created, I may refuse to be inoculated, therefore I am not bound, after I have an existence, to take any thing that I dislike, or any thing that is mischievous; but when the question is, whether I shall exist or no, I must take my existence as it is given me. I beg pardon for expressing myself in this way, but in a case of this sort one is obliged to grapple with questions which were never heard of before, and, I trust, never will again.

If the king grants a charter of incorporation, and the subject accepts it so granted, must not your lordships say, after you have put the legal construction upon this charter, that he must take it just as it is in law, or in fact, or let it alone, and that therefore there is either an end of this charter of Charles II. and the defendant under it, or he stands elected with the power of motion stated in that charter, be it good or bad; if it be good, he is lawfully removed, and there is an end of him that way; if it be bad, the king is deceived in his grant, and the charter never existed.

Here I wish to do justice to the very learned court who pronounced the judgment against which we appear before your lordships in error, and I do assure your lordships, that nothing would be so much apt to cripple and enervate the argument which I am bound in justice to make before your lordships, as that it should be for a moment supposed that any strictures I make upon the judgment, can be imagined to take away from that reverence and respect which I have for the great learning, great ability, and unquestionable integrity of that court; such an idea certainly would not be entertained, and if such an idea were entertained from arguments, however forcible, it would disappoint the justice of the country in appealing to the superior courts.

I lament for one, that what I am about to say, did not occur to me in the court below, but the more I consider it, the more I am of opinion, that taking the charter according to the narrow construction the King's bench put upon it, namely, the power of election *sub modo*, so as to keep it in existence, is worse, far worse than the king's having it in his power to extinguish and destroy a monster which never in the constitution should have existed, for if kept alive, could only be for the purpose of mischief.

But I mean to contend, and I know I shall contend with success, that your lordships cannot say it is in the power of a king of England to do what Charles II. has

done; taking his meaning and intention to be what the learned gentlemen stood upon in the King's-bench, namely, that the charter of Charles II. was a good charter, and accepted *in toto*.

Things very remote in point of time, are apt to pass over the mind, and to strike it much less than when one can bring them home to one's own times and business; and besides, I do not know how I can argue this cause so well as to put it to your lordships in this light, and observe what the house will feel concerning it, for I know of no change which has taken place in the prerogative of the crown, except as modified by acts since the revolution, that prevents his present excellent majesty (little inclined I know to do so) from following the despicable example of that family in whose place he now wears the crown of England.

Let me suppose that there were to be found a man daring enough to advise the king to file his information in the nature of a quo warranto, not against the city of London, for the justice of parliament has put an end to that, but (shall we say) against the city of Bristol, to know by what authority it claims to be a corporation by its corporate name, existing under the charter of ancient kings of England; the attorney general filing that information, knowing, as sir Robert Sawyer knew, that the corporation of Bristol had that legal existence which this corporation of Chester is stated upon the record to have had at the time that infamous and fraudulent information was filed.

Suppose the summons or process upon this information was served upon the corporation, and it did not appear in the term to make any answer to the charge, and a judgment *quousque*, as it is called, were entered upon record in the King's-bench, and that without any writ of seizure, to give notice to the corporation of the contempt it had incurred, or of the judgment that was hanging over its head, without any execution of that judgment, or without any final judgment or seizure under that final judgment, that when the term expired (for there is no limitation here, and if it can be done when the term elapses, it can be done the next day) the king was then to give a new body corporate to Bristol, composed of persons whom it would not be difficult to find in any age, consenting to take such a charter as Charles II. gave Chester; telling them, "You shall be a body, have perpetual succession, and shall be elected in such a particular form as the charter prescribes, but that election is to have none of the privileges belonging to an election, according to the law existing in England, from the commencement of its monarchy; you are to have no permanency in your privileges, you are all creatures of my power, I can cut you down, I can extinguish the corporation in a moment." Suppose this was done (and your lordships will pardon me when I say, that you never can sanction the doing a thing in one instance, which may not be legally done in another; and nothing can be legally done which may not be done without mischief to the government of the country, and consonant to the principles upon which its laws are administered) may I ask, what would be the consequence of such a proceeding in England?—I dare not in this place give the answer! but I am sure every one of your lordships must feel that it was the avowed principle of the glorious revolution, which places these judges upon your lordships' woollacks, no longer the creatures of power, but the guardians of the constitution and the kingdom.

I have in my hand, from the journals of parliament (and though I am not citing this as a case to influence your lordships in a point of law, yet I think it will hardly be rejected by the house of lords, since that auspicious æra) the declaration of the prince of Orange to the Commons of Great-Britain, attributing his visit to this unhappy country principally to the very charters which Charles II. and James II. had granted, with these clauses, and with these powers of amotion, which made corporations the creatures of his will, contrary to the ancient principles of the English laws and constitution—(I will not fatigue your lordships with reading it) having said that he seized upon the charters of most of the towns, and put in persons to be disposed of, and to be removed, at pleasure; "*therefore*," says the deliverer of England, "it is that we have thought fit to come over hither."

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There is no instance, nor can there be any instance stated, where any such charter ever did exist in England, with such a power of amotion, except those charters which produced the revolution, which were reprobated by parliament, which were annihilated and destroyed by a proclamation of king James, when the revolution began to dawn upon him, in an apprehension that they never existed before, as most certainly they never existed since, and that the power of amotion reserved in them, was one of the things which principally outraged the kingdom at that time. And I beg pardon for saying, that I cannot for a moment conceive, if all the rest of this record were out of the way, that your lordships would say this was a power consistent with the prerogative of the crown. I will give your lordships my reason, independently of those high authorities, for thinking so.

I cannot be expected to cite cases to deny the right of doing what was never attempted to be done; I cannot cite judicial cases which were never the subject of judgment; I can only in this high court address myself to your lordships upon what may be supposed to be the reason and principle of law, why this could not be done. Taking a corporation to be the mere creature of the executive powers of the crown, for the purposes of subordinate magistracy in the country, I can see no great harm in a power of removal, for on that supposition I can well understand why his majesty might be safely invested by the constitution with such a power.

But when your lordships consider that corporations are now the organs by which the people convey their sentiments, that thousands and millions of the people of this country can speak by no other organs than their magistracy, and that the power of elections, as given and settled by the last resolution of the house of commons, which, under the 2 Geo. II. is the law of England; you must be convinced that such a reservation would put the whole form and constitution of parliament in the power of the crown.

A general election is very soon to take place. I beg pardon for supposing that in these days any such thing will be attempted; but your lordships know that laws are made, and judgments given, to keep the community safe, by not vesting powers that are not safely to be intrusted; it would then be in the power of the king, in one moment, to cut down any corporation, and, instead of the election being made by the corporation aggregate, consisting of all its members, it would just consist of enough to make it a corporation; so that if it could continue itself by the majority of one, though it consisted of a hundred, it might be cut down so as just to keep it alive for improper purposes. I cannot bring myself for a moment to believe that such a power can possibly exist in England.

When one looks back to ancient times, when one looks back to a question upon paper, one does not see all the consequences of it; but I trust your lordships will not ratify by your judgment, the power of creating a corporation in England with a reservation, which enables the king to do every thing but annihilate the corporation, in consistence with the grant; which gives a perpetual succession and a power of election, which power the king reserves an authority in himself to cripple, to enervate, and, in effect, to annihilate.

What is the reason of my confidence? it is the sense I have of your lordships' integrity and understanding:—I know the size of it too well to believe it possible that your lordships do not feel the strength of what I say; and I know that your love and regard for the constitution of the country, of which you are so near the head, will not permit you to give the go-by to the argument I am now offering; and I really do feel that I ought to pay that compliment to the court of King's-bench to say, that I, in my conscience, believe that it is partly my own fault, that we are here at all at your lordships' bar; for I cannot help thinking, that if it had happily occurred to us to urge this with the strength that belongs to it, it would have produced a different judgment.

Lord Chancellor. Does it appear upon this record, adding your replication to the plea of the defendant, that the charter of king Charles II. is such a charter as enables the persons incorporated by it to elect members to parliament? have you so concluded it? You argue, that if the charter had confined itself only to the exercise

cise of magistracy, and much more if it had confined itself to a mere corporate capacity, and a corporate existence, for enjoying franchises of profit, possibly the king might, in such a charter as that, have reserved an authority to dissolve the whole, or to displace individuals.

But I take the point of your argument to be, that this charter, with this reservation, is so directly contrary to not only a fundamental, but a very delicate, article of the constitution—the freedom of parliament; that with that view it ought to be determined to be illegal. Your argument will go to the capacity of the corporation, in point of fact; but the doubt is, whether you have enough upon these pleadings to show, that this is a corporation sending members to parliament, by the rights of such persons as the reservation in this charter does affect in the extent, in which you have now argued it.

Mr. *Erskine*. I shall endeavour, with great humility and submission, to apply myself to answer the observation which has just now fallen from your lordship.

Lord Chancellor. I mean merely *technically*, without going to the merits.

Mr. *Erskine*. First, if I understand your lordship right, you ask, does it appear upon this record, that Chester, so incorporated as this second replication avers, adding our replication, in this part, to the plea of the defendant, so as that it may all be considered as part of one charter; does it appear from thence, without an averment, that it enables those persons who are stated to be a corporation under it, to elect members to parliament? which would apply, therefore, to shew that it was beyond the power of the king so to deal with a corporation having such elective franchises; as if it were possible that the king might have such power upon a corporation, incorporated for the purposes and principle of government, but not a corporation that had added to it any share in the legislative power of the country? and whether or no we had properly concluded our replication, in that case, by an avoidance of the charter, instead of an avoidance of the particular members under the charter?

Now with respect to the first, I do not know whether they have set forth in their plea, that they have a power to elect members to parliament; but I humbly apprehend that your lordships are bound to take notice of every act of parliament that is a public act; and I think your lordships can never presume upon this record (for then it would be a nonentity another way) that there is another corporation in Chester, capable of sending members to parliament; and that this is some spurious corporation, under which these persons may be elected, there being another good charter, by which a corporation may exist in that place, capable of sending members to parliament.

Lord Kenyon. Does it send members to parliament by those constituent members of the corporation—by the mayor, aldermen, and common-council?

Mr. *Erskine*. The right of election is in the corporation. The act of parliament with which I was going to trouble your lordships, is the 34 and 35 Hen. VIII.

Lord Chancellor. I recollect what the act is.

Mr. *Erskine*. That I may not embarrass your lordships, by not being prepared upon the sudden to answer to that which depends upon an act of parliament, I will take the liberty of applying myself to your lordships' second objection.

I take it to be perfectly clear, more peculiarly upon an information in the nature of quo warranto, that your lordships need look no further than the record; and that the conclusion which we draw upon the record, never can affect your lordships' judgment upon the facts; for your lordships are to infer the legal consequence from the facts upon the record; and, therefore, though we were to draw an erroneous and illegal conclusion from facts which carry a contrary one, we shall arrive at that conclusion, by your lordships' judgment, correcting our error; for the question upon this record is, what are the facts, and what is the legal consequence arising from those facts?

I cannot put this in a clearer way than by considering a defendant's demurrer in a private action;—a private person must shew a right in himself; and, however the defendant's plea may pass by the declaration in the cause, the defendant undoubtedly

doubtedly must have judgment, if the plaintiff's declaration does not state a sufficient title in himself, to enable him to have judgment, independent of the defendant's plea. Now to try this in case of quo warranto. But first let me mark the principle:—no franchise whatever can exist in the hand of any subject, or number of subjects, unless it proceeds from the king; the king is the fountain of all authority; no persons can be a corporation without the king's grant; no persons can enjoy any public franchise without the king's grant; the king, therefore, sets forth no title which he has in himself, to the thing exercised by the defendant; he only looks to the fact of the exercise, and asks the question of those who exercise it, by what authority they presume to do so?

So that an information, in the nature of a quo warranto, only says, "shew me the grant from myself, by which you exercise this authority;" because if it is not in the subject, it must be in the king. The defendant states, a plea; the crown demurs upon that. It cannot be said, "true, the defendant fails to shew a title to a market, a fair, the right of taking toll, or any franchise; but where is the king's title?" No; the king only asks the question by the information.

Now to apply this (which will bring my argument before your lordships neatly, provided the fact bears me out) I am to suppose myself, for the purpose of the argument, in possession of your lordships' judgment, that this city sends members to parliament; and that it has appeared that king Charles II. has assumed a power of garbling this corporation at pleasure, perhaps *in the very moment of executing that public trust, which is for balancing the constitution against the power of the king.* How does my replication apply? why it adds to the charter of Charles II. as pleaded by the defendant, this part which we consider as fatal. Then we state the exercise of the crown under it—the signification of that order; and then we draw the conclusion, as your lordship has observed, that these corporators were *de jure* and *de facto* removed; suppose we had no conclusion at all, it is perfect surplusage.

Lord Chancellor. Suppose you had no conclusion at all, would it be the subject of general demurrer or special?

Mr. Erskine. I conceive of a special demurrer; but I do not know whether it would be the subject of either;—if I were to argue such a demurrer, I should say, the only reason why it can, in the nature of things, be the subject of a special demurrer is, that it might be a kindness to the advocates, and perhaps a convenience to the judges, to know the question, which was likely to come before them upon that record; it would lead to a previous consideration of the question to be made upon it; but upon the whole of this record your lordships must say, is the crown or the defendant entitled to judgment? I say, the king cannot reserve such a power as Charles II. has reserved upon this charter, as stated upon the record, in the first and second replication; and the crown can avail itself of every thing upon the record; the prosecutor can reply as many matters as he pleases, and your lordships will look at the *whole* record.

Then what do your lordships see upon this record?—You cannot help seeing this—(whether your lordships will see the remainder, is by and by to be considered)—that the defendant claims to be a corporator of Cheiter, under an election upon the 22d of March, in the 22d year of king George III. by the major part of the mayor, aldermen, and common-council, existing under the charter of Charles II. which he sets forth in his plea:—to which I say, "you impose upon the court, that is not the charter, but a *part* of it.—You have learned from the author of your corporation, to garble charters. You have not brought the *whole* before the court, we bring the remainder, and show that reserved power of amotion, contrary to the law and the principles of the constitution." We might have stopped here; surplusage never vitiates. Suppose we had stopped at the end of this, and drawn no conclusion at all; but we do more, for we show the *exercise* of this illegal power; but we had no occasion to do so, the instant that we added the reserved power of amotion, and incorporated it with the charter (and they have taken no issue that

that is part of their charter) then I conceive it is a part of their charter under which they have their being.

I felt strongly the criticism which your lordship made upon that part of our pleadings, that where we said, that from the time of the restoring charter, the charter of Charles II. did cease, determine, and become void, we drew our conclusions narrower than the facts warranted. I mean to draw them differently; I have the facts upon this record, and having them in a court of error, I pray the judgment of law arising upon those facts, because what conclusion we may from the infirmities or errors of our original conceptions have drawn, signifies nothing; and therefore when I charge these gentlemen with not having demurred, I do not mean to say that it ousts them of any objection of law to those matters that were demurrable, but only that it leads to an inference of what these learned gentlemen thought of this matter, when it was presented to their understanding. As this case will by and by be supported by abilities infinitely greater than I possess, I will leave to Mr. Serjeant Adair the cavity that remains to be filled up, which will be better than my speaking upon a subject I am not perfectly prepared for.

I now come to another question, which brings me to consider your lordships' observation upon the plea which I have as yet found no fault with in point of form. Now I conceive that this is mainly defective in point of form; it certainly does not follow the most approved precedents in pleading; it does not follow them not even with the exception which your lordship supposed at the time of the case of East Loo, for there I believe the pleadings are exactly consonant to the rule I humbly mean to lay down, and are agreeable to what your lordship threw out for consideration.

They say that Charles II. willed in future, that there should be a mayor, that there should be aldermen, that there should be justices, that there should be coroners, that there should be a recorder, and that there should be common-council-men; but if he stops there, is not that perfectly a dead letter? Suppose the great seal is put to that charter, and that it is good in point of form, it is a body without a soul; it is saying that the king has willed and intended that there *shall* be such persons; but unless he sets this corporation in motion, unless he names the persons who are to be the parents of all those that are to follow, the population of a corporation (if I may so express myself) cannot go on; it is the same as if the Maker of the universe had said, there shall be this, and shall be the other; but if he had not created the first man and woman, I take it for granted, there would have been no inhabitants upon the earth; and so in the creation of a corporation, it is not the intention of the king that makes the corporation; you must show the king *has done* the thing.

Now has he ever made a mayor? has he ever made common-council-men? It does not appear upon this record that he has; but it is stated that he has made so many aldermen. If the aldermen could have continued their own existence without the aid of mayor and common-council-men, then it might be said there is a good election; but the defendant has pleaded his election by the major part of the mayor, aldermen, and common-council-men, when it does not appear to your lordships upon this record, that there ever was a mayor or common-council-man under this charter.

It should have been stated, that his majesty, in pursuance of those intentions, had done that in the case of the mayor, which he had done in the case of the aldermen; that the body corporate continued up to such a day, and the defendant should have averred his own election upon that day; that I think would have been the proper pleading.

But, for argument sake, I will suppose that this objection has not the weight which I humbly think belongs to it; and that your lordships must say, that there was in fact a corporation which Charles II. set in motion by the original appointment of mayor, of aldermen, and of common-council. Having already troubled your lordships, I am afraid at too great length, with the objections *de jure*, let us see in tracing

tracing down the existence of this corporation, *de facto*, upon the record, where we leave it, and where it perishes.

It states, first of all, who were the existing corporators in the reign of king James II. on the 12th of August, 1688; and then it goes on to aver the actual removal of them. It will be contended, that this is an averment *in law*—I mean to contend that it is a clear averment *of fact*. It is true, we have said, that by the signification of this, they were *in law* removed, and that the right of electing aldermen thereby ceased; but I say, we have, upon this replication, also averred, that whether this was a good charter at the beginning, or a bad one—and whether the order of amotion ever was duly signified or not (but the jury have found that it was) that *in fact* they were removed; not only *de jure*, but *de facto*. “You ought to have traversed this averment, and stated, that your corporators were in fact not removed, but continued in existence; notwithstanding the signification of that order, up to the time of the election, upon which you state your title in your plea.”

If this is not an averment in fact, I am happy I have been in other walks of the profession than that which obliges gentlemen to draw records; for I do not know how I, or any man who sat down to aver a fact, could have averred it more distinctly. “The coroner and attorney of our sovereign lord the now king,” after enumerating every person who at that time existed in the corporation, says, “that, king James, upon the 12th day of August, 1688, by his order in privy council was pleased to order, and did thereby order, that they should be, and they were thereby, removed and displaced.”

I do not mean to contend, that the mere knowledge they might have of the existence of the order did remove them; and Mr. Wood did not mean, by his first part of the record, to aver *that* fact. Why? because it would have been premature; he has stated the order of James II. in council, directed to these people; he is only reciting that king James made this order, and said, they should be, and they were, thereby removed; and then he goes on, “and the said coroner and attorney of our lord the king, &c. says, that the said order in council, under the seal of the said privy council, *was signified*.”

He goes on, your lordships see, by steps; he has already stated the legal consequence, not in the general way in which, in formal conclusion, he must state it, which he does at the end of the replication. He first says, king James made the order, then mentions all the persons existing in the corporation of Chester when he made it; then he goes on and says, “the said order, under the seal of the privy council, *was signified*,” then enumerates all to whom the order was directed; and then enumerates them over again, to shew, that the signification was co-extensive with the order, as the order was co-extensive with the corporation; and then he says, “that they and each of them, severally, became, and were, removed from their several respective offices before-mentioned.”

How did they become removed? I do not mean they were destroyed by a stroke from heaven; it was from a very different quarter undoubtedly—from the signification of the amoving order; but when it is said, that I lost my existence by a particular mode, the fact of losing my existence is not denied. After having stated it first, and the signification of the order, Mr. Wood replies, “they and each of them, severally and respectively, were removed from their respective offices;” the consequence of that amotion, in fact, was (and your lordships will see how accurately the conclusion is drawn) “wherefore the said power in the said last-mentioned letters patent, as to the election of aldermen, ceased and determined.”

I don't know that this is, strictly speaking, a legal conclusion; it is more properly one conclusion of fact from another fact before averred; so that when it says, “wherefore the said power, as to the election of aldermen, ceased;” that is a mere allegation of fact; for how could the right of electing aldermen go on and exist, after all the body, out of which they were to be elected, ceased, determined, and was put an end to?

I have already detained your lordships, I am afraid, too long, upon this first part of the case; which, as I said when I had the honour to address your lordships at first, was what I little concerned myself with looking at, or considering; because I own I should be mortified if I were to arrive at your lordships' decision upon any thing I have said, notwithstanding I think I am clearly entitled to it; because I think that, strong as the ground is in point of law, in that particular part, and involved with matter of the highest importance to the constitution, that which follows is perhaps still more important.

The defendant having stated his election under the charter of Charles II. the replication, in order to avoid every possible title under that charter, sets forth the charter granted by Henry VII. under the seal of the county palatine, confirmed by the infirmus-charter of queen Elizabeth, under the great seal of England. And before I pursue the question which arises upon this part of the record, I would trouble your lordships with a few observations concerning the original validity of the first charter here put upon the record.

My learned friend, Mr. Serjeant Adair, stated a great number of authorities to your lordships, concerning the propriety of our replication, as pleaded; and if I take right the objection which your lordships made, which I did not consider in the least as in the nature of any judgment, or of any decided opinion, but as a matter for consideration, it was this, whether there should not be some averment upon the face of our replication, which is not to be found in it, and without which it is lame and imperfect, and the first charter does not appear to be good; and if your lordships are bound to take the first to be bad, the second is bad also, inasmuch as that cannot be confirmed which never existed. If I take right what your lordships threw out, it was this, that we should have averred, "that king Henry VII. by his letters patent, under the seal of the county palatine of Chester, could create a corporation." Now I apprehend that is unnecessary.

In the first place, your lordships must take notice of all the titles of the king, and of all the authorities which, by the law, as it now stands, or as it stood at the time of Henry VII. are vested in the king;—your lordships will take judicial cognizance of all the public acts, as they confirm the common law of the kingdom, and all the estates, offices, and characters of the king. Now the first question to be considered is, do your lordships think it would have been necessary to aver, that Henry VII. was count palatine of Chester? I apprehend not.

Lord Chancellor. To be sure, the doubt goes upon this, and you have taken it right. By the common law this is a franchise that cannot spring except from the great seal; there was a capacity in the king to create a jurisdiction extensive enough to create this franchise by a seal of his own; and the doubt conceived upon this was, whether the existence of that franchise, and consequently the authority of that seal, ought not to have been averred upon the pleadings, or whether that be a fact of which courts of law will take judicial cognizance?

Mr. Erskine. I was humbly endeavouring to state to your lordships, that I take that to be a fact, of which the courts will take judicial cognizance. First, because your lordships will notice, as a fact without any averment, that king Henry VII. was count palatine of Chester; your lordships will also take the nature and constitution of a county palatine, without an averment; that is to say, that you will know what belongs to the county palatine of Lancaster, and what belongs to the county palatine of Chester; and this, because it appears upon the books, in various instances, that the county palatine of Lancaster was formed upon the model of the county palatine of Chester, as appears by lord Coke's fourth *Institute*, which was stated by Mr. Serjeant Adair, and that both had *jura regalia*; and your lordships must also take it to be a legal consequence, from having *jura regalia*, that they had the right of constituting a corporation. That the count palatine of Chester, not being king of England, might have made a corporation within his jurisdiction; and your lordships will find, by referring to the statute 34 and 35 Henry VIII. that it is unnecessary to aver, that the king had the county palatine of Chester vested in him.

Besides

Besides that, your lordships will find numerous authorities; particularly that in *Lutwyche*, stated by Mr. Serjeant Adair, that the king was count palatine of Chester, or as head of any county palatine, can make a corporation, under the seal of the county palatine; for so might the count palatine himself, as having *jura regalia*.

But this is not all; your lordships know, that the writs for process, in the courts of the county palatine of Chester, still issue under the seal of the county palatine; so did every grant that was made by the king of England, as being the head of the county palatine of Chester, till the act of Henry VIII. which, for the first time, authorized the appointment of justices, under the great seal of England.

Besides that we have an act of parliament which, I think, will put an end to all doubts; and perhaps it was not in your lordships' view at the time—it is an act for levying fines, with proclamations of lands, within the county and city of Chester, 43 *Eliz.* cap. 15. The general statute concerning the levying of fines, not extending itself to this part of the kingdom, it became necessary to extend it afterwards to the county palatine of Chester; that act which extended into the county palatine of Chester, was held not to extend into the city of Chester; which being a county in itself, left the operation of law defective, with regard to the city of Chester; and, therefore, it was thought necessary to explain it by another act of parliament, and it states, “Whereas by an act made in the parliament holden at Westminster, &c.” (See p. 399.)

Lord Chancellor. The city of Chester, by your charter, was, with the exception of the Castle, with the precincts, and the liberty of Le Gloverstone.

Mr. Erskine. It was. I apprehend, therefore, that there can be no objection to the king's having made this a corporation by letters patent, under the seal of the county palatine; so far from it, that till the statute of Henry VIII. there was no other way of appointing any magistrates of that county; and it is particularly noticed in the statute of Henry VIII. which takes notice of sir John Englefield, who was at that time chief justice of Chester, by virtue of an appointment under the seal of the county palatine. What I mainly rely upon is this, that your lordships, taking notice of this act of parliament, which states the king to be count palatine of Chester, which count palatine hath *jura regalia*, will not require an averment, that he had a right to make a corporation of Chester, by letters patent, under the seal of the county palatine of Chester.

I shall now go on to state the averments in our replication: it avers, that both these charters were in force at the time of the judgment therein after-mentioned, namely, the judgment *quousque*; and then states the information of sir Robert Sawyer—the judgment *quousque*—king James's order in council of amoval—his order in council for restoring the mayor and citizens of Chester—his restoring charter in pursuance of that order—and the acceptance of that charter; and then finishes with a conclusion, upon which I have already remarked, that I admit it is narrower than we might have made from the facts; but I have submitted that we have a right to stand upon these facts, and to ask the legal conclusion from this house.

But your lordships truly remarked, in the criticism upon our replication, that we went further than was necessary; for to repel the charter of Charles II. we might have satisfied ourselves by stating the antecedent charters of Henry VII. and Elizabeth; because if those charters existed, as we contend they did, up to the time of the restoring charter, or even if they had an existence at the time Charles II. granted his charter (which is the question upon the record) then it is clear that the charter of Charles II. must be void, from the repulsion of the antecedent charters.

Your lordships cannot but observe the very different view of this question, which the learned gentlemen, on the other side your lordships' bar, have now, from what they had when it first presented itself to them, and the striking inconsistency between the mode of pleading, which they adopted, and the argument they are now obliged to sustain. They set out the information of sir Robert Sawyer, with the judgment *quousque* upon it; which judgment they now contend to have been the

destruction of the antecedent corporation, and that, therefore, their charter was not repelled by its existence.

If it be true, as they contend, that the operation of that *quousque* judgment was utterly to annihilate and to destroy the charter of Henry VII. and Elizabeth; if that be law upon which they now stand so erect before your lordships, how came they to put upon the record a rejoinder to the replication, utterly inconsistent with the idea of such law? Their rejoinder is not, that *by the judgment quousque* this corporation was dissolved—or that if it was not actually dissolved, its operations were so crippled, as to make it necessary for the king to constitute another; but they say in these words, “That such further proceedings were had upon the said information, in that replication mentioned, in the said court of the said lord the late king Charles II. that afterwards, in the term of the Holy Trinity, in the 36th year of the reign of the said king, it was considered by the said court of the said lord the late king Charles II. before the king himself, that the said liberties, privileges, and franchises, in the said last-mentioned information specified, should be seized into the hands of the said lord the king, and the said mayor and citizens be excluded and removed therefrom.”

If this were true, no doubt after having been seized, until the further order of the court, they might then be seized finally. But if it be contended, that their not coming in before the first judgment, was an extinguishment of the corporation, how is it possible that they could be alive, and in existence, at a *future* time? or how could they be excluded from what they had been before excluded? Persons that were not in existence, were to have judgment against them! persons that were annihilated were to revive, for the purpose of being killed again! and to be ousted of that from which they had been excluded by an anterior judgment!

As I said before, this will not alter the law; for if your lordships should be of opinion, that this *quousque* judgment can have the effect which must be argued for, then the defendant, in error, will prevail, otherwise the judgment of the King's bench must be reversed; but it entitles me, I think, to a little favour and attention from the house, and must lead to no little jealousy and distrust in your lordships' minds, when you hear arguments supported at the bar, utterly inconsistent with the ideas entertained by the same learned and experienced persons, when first this subject was presented to their understandings.

I will go higher than this, and, I believe, there are those among your lordships who recollect the truth of what I say, that when the record went down to trial, the *quousque* judgment was considered, neither by the learned judge who tried the question, nor by the counsel, to be destructive of that corporation, or to carry with it those inevitable consequences which have never, till the hour of their distresses, been imagined!

My learned friends threw away the scabbard, and fought for their final judgment, without leaving a retreating argument; but when they found their case pared down, they were obliged to come with a proposition so monstrous, that I have no language to put it home to your lordships' breasts; they were obliged to contend, that even a judgment *quousque*, without notice upon it to the corporation to come in and replevy, had the same effect as a *final* judgment, which before they had contended as the only conclusive judgment!

I shall not argue the two propositions that were supported by my learned friend, Mr. Serjeant Adair, which were maintained with a size of ability which, I am sure, it rarely happens to any man to have an opportunity of observing. I should be waiting your lordships' time, and shewing the difference between him and myself (which I am selfish enough not to wish to do) if I were to go over again those arguments by which he so ably maintained those two propositions; namely, that a corporation can neither dissolve itself, nor be dissolved by any judgment of a court of law.

These are citadels to which, I hope, I shall not be driven to retire; but surely the obligations of my client are strong to that able person who erected them. While, however,

however, I have them to retire into, if it be necessary, I will not here avail myself of their strength, but will come out upon the plain to meet my adversary.

But supposing, for argument sake, that a corporation *could* be surrendered, or *could* be dissolved. Supposing that this were a proceeding by writ of quo warranto, instead of *information* in the nature of quo warranto—with a summons and *venire*—with a judgment *quousque*, followed up by a *seizure*—a return of the sheriff upon that seizure—with *final* judgment and seizure upon that final judgment. If, where all these had taken place, learned men and high courts have *doubted* whether they would annihilate a corporation, then must not your lordships' minds not only hang back from, but start at, the position which must be maintained on the other side of the bar? If that which is the real, *bona fide* writ of quo warranto, for palpable abuses, cannot touch a corporation, yet that this—what shall I call it? this *information*, commencing in foul fraud—which has the lie given it upon the record—which asks a question that the record itself answers—which complains of no abuse—which is a judgment only till the court shall further order—a judgment of seizure which is never carried into execution; that this proceeding, without final judgment, shall effect that which a writ of quo warranto, pursued in the manner I have stated, never did effect.

My lords, I will preface the argument to which I now advance, by saying this (it is a bold preface, but I make it) that if they can find in the *records* of English courts of justice, or the *reports* of their decisions, any one instance of a corporation, or the most petty, contemptible franchise of the meanest individual, forfeited and destroyed, so as to be given to another, in the room of him who had it, upon an *information*, in the nature of a quo warranto, upon a judgment *quousque*, followed by no seizure, and by no final judgment—what do I say? the *records* of the courts, or the *reports* of their decisions? if they can find it in the *writing* of any learned man—if they can find it even in these abominable arguments in the *city of London's case*—if they can find it in an instance of any one council, *arguing for his own purposes*—if they can find it in any one *historian*, or in any one *theory*, or *opinion*, thrown out in the loosest manner—I abandon all claim to your judgment.

I know my duty in the cause—I feel its importance—and I thus pledge myself, knowing that there can be no such case, I take the proposition, as I have a right to take it, a judgment *quousque* followed by no seizure;* remembering at the same time, that I stand upon a tower of strength which was built for me by my able leader; that even if there had been a final judgment, and a seizure upon it, I should have been equally safe; but coming down upon the plain, in order to encounter the naked question upon this record, I assert, that there never was a theory or opinion against me, however loosely urged; that it never entered into the imagination of man, as sir George Treby said in the *city of London's case*, though he was advancing a proposition much more difficult than that I have to maintain now before your lordships.

My first proposition is this, That two corporations cannot exist, for the same purposes of government, in the same place, at the same time. I will cite no other authority for that than the *King against Passmore*, in the term reports of Easter term, 1789, which I think is the strongest case against the argument I am to maintain to-day, upon the dissolution of corporations. I don't say I do not perfectly agree with that judgment, I will say by and by what I do.

The second proposition which I shall humbly maintain is this, which I believe is as little capable of being disputed, That the king, having constituted a corporation, for any given purposes of government, in any place, with perpetual power of succession, cannot, while that corporation remains undissolved and in existence, derogate from his own grant, by transferring its power and authority to another body.

Now

* The learned council certainly had a right to take it thus, as no writ of seizure was stated on the record to have issued—the *fact* however was, that it did issue.

Now as I stand upon very strong ground, from which I know that nothing can possibly remove me, I am not afraid to state what the King's-bench laid down in the Helstone case, from which it is not necessary that I should differ.

There was a corporation at Helstone. The individual members, the aggregate of which formed the being of the corporation, had died off, till within three or four, and these three or four who remained in existence, were below the number necessary to renovate the corporation, or to do any acts for which the corporation was originally instituted. They could make no bye-laws—they could not govern—they could have no magistracy, because it was limited, by the charter, to a larger number only, to do those acts

Lord Chancellor. Were all the integral parts of that corporation existing?

Mr. Erskine. No, gone.

Lord Chancellor. Because the number of the corporation might be reduced to such a degree, that they might be unable to exercise *all* the acts the charter enabled them to exercise, and yet there might be, by the existence of the integral parts, a capacity to renew them.

Mr. Erskine. Then I cannot say what the judgment might have been; but your lordships will observe, that this case of Helstone cannot touch me, because I mean to contend upon this record, that this corporation, if it ever was touched at all by the judgment, was capable of renovation. I first of all say, it never was touched even in its functions—it was never suspended—never prevented from making bye-laws—never prevented from exercising magistracy, or doing any one of the things for which the corporation was instituted.

That even if it had been suspended by the proceedings appearing against it upon the record, it was found, and had the principle of revival in it; and that the king never had done an act which, by his authority, would have put that corporation in the situation Helstone is supposed to be; namely, incapable of renovation—incapable of revival—incapable of doing those acts for which it was constituted by the crown. From this second proposition, namely, that there cannot be two corporations in the same place, capable of performing those functions, and having the power of revival and existence, it will follow as a corollary, that unless it can be shewn that the corporation of Chester, once existing under the charters of Henry VII. and Elizabeth, had expired and become extinct at the time Charles II. created it a body politic, that body politic never could have a legal existence.

Then I mean to confine myself to the narrow question stated upon this record; and I take it, that upon all this mass of pleadings—upon all this variety of authorities that have been cited, the case comes to this—whether in consequence of sir Robert Sawyer's information, filed against the corporation of Chester, as a corporation, addressed to it by its corporate name, under its charter; not charging any abuse of liberties, but only questioning their original existence, the interlocutory judgment (for so I venture to call it) of seizure, followed by no writ stated upon this record to have issued to the sheriff, or any seizure made by the sheriff in pursuance of it (as I will shew your lordships to have been the uniform course, from the beginning of history) or any return made by the sheriff of any thing he had done under it, much less any final judgment of ouster or of seizure—whether or no it can be said that the corporation was so at an end as to be incapable of the grace of James II.'s charter, or whether, in short, it was not in such existence as that Charles II.'s charter never could, by any possibility, have attached upon it; take it one way or other, there is an end of the title pleaded by the defendant.

I mean first of all to contend, that this information, to have had any effect at all, ought to have been against the natural persons composing that corporate body; I take it to be strictly regular to look at the report of the judgment in the King's-bench, not by way of criticising upon the language of the judgment, but to shew that this was considered, by the learned judge who pronounced the judgment of the court of King's-bench, to be an information in disaffirmance of the existence of such a corporation; it was stated, by the judge, that it must be so taken to be; this

this will shew what sort of a judgment your lordships have before you, and that it is such a judgment as supposing it to be a good species of information (which I deny) is utterly inconsistent with the end of the suit; for there are but two sorts of informations.

If a subject, or subjects, rather in the plural number, band themselves together, and assume to themselves the functions of magistracy, which belong only to the crown to create, never having had any grant from the crown, the crown does not sanction those impostures by addressing them upon its records, by the name they give themselves; but finds out who are the natural persons that have so usurped, and calls upon them, as natural persons, to shew why they have so usurped. Then from the nature of the thing, what must such a judgment be? Seizure? No, says lord Hale—no, says sir Robert Sawyer—the king cannot seize that which he cannot have. You cannot seize that which never existed—you must pronounce against them judgment of ouster.

Where you file your information in disaffirmance of their being a corporation, it is said, by lord Hale, in his common place-book, in Lincoln's inn library (as stated by Pollexfen, in his argument in the city of London's case, pages 70-71) to be decided in the case of *Cusack*, that it should be brought against the natural persons, and not against the corporation, and that the judgment there must be ouster. Now suppose natural persons banded together, exercise the functions of magistracy and government, what is the effect of a judgment of ouster? It is this—it renders illegal all their acts; no man can justify under them; from that moment they are gone, and they can exercise no one act of government.

I will state to your lordships what Mr. Justice Eyre said upon that subject in sir James Smith's case, where my lord Holt agrees with him; it is in *Shower*, 281. "The quo warranto should have been brought against the burgesses and inhabitants of the place; it is strange that it should have been brought against the corporation—it should have been brought against the natural persons, and not against the corporation."

There is no one case from the beginning of the History of England, where such an information has been effectual. The only two cases where it has been carried on to a judgment of seizure against a corporate body, by a corporate name, that I can find, are the case of the city of London, and the case of Malmesbury. The case of the city of London will surely never be considered as an authority—it is well known that the judgment was reprobated as illegal, by act of parliament, and your lordships well know in what manner that infamous judgment was brought about.

The case of Malmesbury is decisive for me. We have the record—it is the case of an information, in the nature of a quo warranto, against the borough of Malmesbury, for usurping to be a corporation the same as Chester. There is no appearance—there is a judgment *quousque*—there is final judgment—there is a writ of error in parliament—general error assigned;—and the judgment is reversed.

Now I ask your lordships whether it be possible for judges to travel out of the record, and to arrest and reverse a judgment upon any thing that does not appear upon the record? What then reversed the judgment in Malmesbury? nothing out of the record; consequently I am entitled to say, that a record, stating what the record in Malmesbury states, as this record does, is bad in law, and void; for that the judgment, in an information against Malmesbury, by its corporate name, without appearance—with judgment of seizure—with judgment final—was reversed. It was reversed, I take for granted, for two reasons:—because it was brought in disaffirmance of the corporation, whereas it should have been brought against the natural persons; and because the judgment was of seizure, whereas it should have been of ouster.

I now come to what I consider to be the most important part of this cause; I now come further out than I did before, and I give up this objection in argument for the sake of supporting another. Supposing then that a corporation might be dissolved

dissolved by judgment, on an information, instead of a writ of *quo warranto*; supposing it could be done (which I absolutely deny) before appearance and final judgment, and the execution of that judgment; then let us see how it stands upon the matter, stated upon this record, of the judgment *quousque*.

It will not be asserted, that standing in a situation where a man may have incurred a forfeiture, places him in the line of forfeiture, unless the judgment which creates that forfeiture is pronounced against him; if I place myself, by my own incaution, in a situation, of which, if the crown take advantage, I might be deprived of my liberties, am I deprived of them unless the crown avails itself of the situation in which I have placed myself, either by office found, or by the judgment of a court of law?

Supposing I were to stand out from the law of my country—to be proclaimed, from day to day, and from year to year, in the Sheriff's court—that I were to stand out at the exigent, would it be said that I was an outlaw, unless judgment of outlawry were pronounced against me? could the chief justice of the King's-bench refuse to try my cause, with all the proclamations of the sheriff's court against me, unless I had been outlawed by regular process? No. I will fortify this by the authority of one of the greatest justices that ever sat in England—the ornament of his own times, and the admiration of posterity—lord chief justice Holt.

Your lordships may recollect (it is connected with your own house) that lord Banbury was indicted at the Old Bailey, for murder; he petitioned this house to be tried at your lordships' bar, claiming the inheritance of the peerage of this country; that the peers assembled in great form and solemnity, upon that petition, and pronounced, that lord Banbury was no peer, and refused him the protection and privileges of this house. Upon which the indictment went on against him at the Old Bailey; he was indicted by the name of Charles Knowles; he pleaded misnomer; that he was a peer of the realm, by the title of earl Banbury.

The attorney-general applied, by petition; your lordships pronounced upon it; upon that, the defendant demurred, and it came on before lord Holt, who states, as appears by the report in *Raymond*, that many observations had been made upon his judgment; and it had been questioned in this house, and a committee appointed, calling upon him to give the reasons of his judgment, which, with great spirit, he refused to do, unless called upon by writ of error; upon which they threatened him; which did, as all such proceedings I hope will do, vanish in smoke.

Lord Holt states his own judgment; he says, a judgment ought to be complete and formal; he admits, that it appeared before him by high authority, which he very much revered, that lord Banbury was not a peer; but he said, that unless there was a judgment of law, excluding from the dignity, privilege, and character, of peerage, he could not, and ought not, to take notice of it; but that they ought to allow him privilege of peerage, and refused to try him as a subject not having the peerage.

Now mark the expressions of lord Holt. He states, that if it appear to the court, in any manner, that a man has no title, as, “if trespass be brought for a trespass done in the land belonging to a house, and it appears at the trial, that the plaintiff hath no title to the house, yet the court cannot give judgment to put the party out of possession of the house.” He then (which is, what I lay my finger upon) says, that “if *quo warranto* be brought for usurping royal franchises, and the court give their opinion, that the defendant hath no title to them, unless they proceed and say, *ut abinde excludatur*, it avails nothing.”

Is not that a declaration of lord Holt, who, independently of his universal knowledge of the law, and history of his country, lived in the time when these judgments and charters were in agitation? Is not this a declaration, that nothing but a judgment *ut abinde excludatur* will avail? My learned friends knew it; they knew that nothing but a final judgment of seizure and ouster could destroy the corporation, or suspend their functions; and, therefore, they rejoined the existence of such a judgment, and it is negatived by the finding of the jury.

Now

Now they are obliged to come back again, and to say, that this judgment *quousque* will answer their purpose equally well; it is said that the judgment *quousque* dissolved the corporation; and yet it appears, that they may come in and replevin! That seems very strange; if the corporation is dissolved by the judgment, who is to replevy?

There have been several seizures of franchises which have been replevied; now that could not be unless there was a corporation to replevy them; I shall use no words of my own, except in my mode of expression, as I shall take what I have to say out of the most solemn authorities that are to be found in the books, and I shall not leave those authorities in any one word that I have to say to your lordships.

But first of all, let me ask your lordships how it appears, upon all the authorities, that a judgment operates?

Finch, in folio 13, in his argument in the city of London's case, after quoting all the judgments in quo warranto, with which he fills several pages, says expressly, in his opening (not when pushed to it by argument) "These are not judgments in quo warranto, to oust a corporation of the franchise of being a corporation." Then what are they? why, he says, that which your lordships see I do not admit, but which would not hurt my argument if I did; "but if the king seizes and gives the custody to another, the corporation is but a name, and cannot act."

He admits the judgment does not oust it of the franchise of being a corporation; no thanks for his admission; for it could not be endured in that court, corruptly constituted as it was. When men are driven from one refuge, they are obliged to take shelter under another; he says, the corporation is but a name, and cannot act; then, after enumerating this place seized, that seized, and the other seized, and *custodes* put into them, by the king, he says, and which almost makes an end of the argument, "but they ended in submission, and so all was quiet." This is Finch's argument.

Now your lordships will see that I am in possession of a decisive authority, that even a seizure itself is no suspension of the functions of a corporation. My learned friend, the serjeant, laid before your lordships the proceedings of the city of London, in the court of hustings, by their corporate name, subsequent to seizure, when the king had been eleven years in possession.

The borough of Southampton, and New Malton, and various others, which pleaded charter, prescription, &c. were seized into the king's hand, and *custodes* put in possession of them.

Lord Holt, who was deciding upon this question, not as your lordships are, at the distance of a century, but in the third of William and Mary, soon after the revolution, which arose almost from the fatal consequences likely to happen to the constitution, by the infamous proceedings I am stating; after quoting Hayward v. Fulcher, and all those other cases which show that a corporation cannot be dissolved; lord Holt says, in order to shew that a seizure does not suspend them, "franchises are not essential to a corporation, but a privilege pertaining to it; the essence of a corporation is to make bye-laws, and to govern their own members, which they may do while their franchises continue seized."

I humbly apprehend, that the inevitable consequence and conclusion is this, that this corporation by no means stands in the same situation that Helstone was supposed to stand in, by the court of King's-bench, where three members remained, without any power of renovation, but where nothing could be done by any body else, while those people existed. Here lord Holt says, that notwithstanding franchises are seized (and why I should argue it I don't know, because there is no seizure in this case; but I have a right to fortify myself beyond the very mark upon which I stand) they may make bye-laws, and govern their members; and then, after stating the effect of a judgment of ouster, he says, "I do not think that a judgment of seizure, where it is a final judgment, is ineffectual, and the judgment of seizure *quousque* shews it."

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Lord

Lord Holt states in what case it is not necessary to give effect to a judgment by execution; he says, "if there be a judgment of ouster, there needs no seizure, for to what purpose should there be a seizure, by the king, when he may not have it?" The law is the same as to a judgment and seizure as forfeited; for this amounts to a judgment of ouster, but otherwise of a judgment *quousque*. This I think plainly shews the opinion entertained by the court of King's-bench, in the case of Sir James Smith, which happened so very soon after the revolution.

He won't say it dissolves a corporation—he won't say it suspends it—he won't say it destroys its functions—he does not think it ineffectual; that is all he will say, even of a final judgment, and the reason he gives is, "the judgment *quousque* shews it;" shews what? shews that a judgment final may not be ineffectual; and lord Holt relies upon that case of the King *v.* Quadryng, where it did nothing—where it ousted nothing, though there was a seizure issuing upon that judgment.

I believe it is meant to be contended, as it was contended in the King's-bench (and this I take to be the strength and the whole reliance of my learned friends on the other side your lordships' bar) that this judgment *quousque*, though it did not oust the corporation of the franchise of being a corporation, but only seized the franchises; yet, not coming in within the term, they lost the season, within which by-law they might replevy, and consequently the possibility of redemption or renovation; I will directly meet that argument.

In the first place, I say, there is no one authority in the books that goes such a length; and your lordships will see that [when I come to make, what I had, for the arrangement of my own argument, considered as *observations* upon the judgment of the court of King's-bench (and which I shall do with the greatest respect and reverence to the learned judges) the authorities which I am humbly to suppose that judgment was founded upon. Now supposing there had been a seizure in this case; if, according to lord Holt, the seizure does not suspend the corporation, if it may carry on its functions, make its bye-laws, govern its members, even though the king were in possession, under a seizure; how is it prevented from carrying on its functions, if the judgment does not touch it? But I will drop that, and come to the narrow point on which I will put the case, unless I am driven back to the other part of it I mentioned before.

Your lordship put this question to my friend Mr. Serjeant Adair, "you call (I understood your lordship to say) this a process to compel appearance; how then is it to compel appearance, if it does not do something which renders it destructive of the corporation, till it does appear?"

The question is momentous, but I can answer it: The answer is this; the judgment does nothing but authorize to seize. My being in a situation, if the king takes advantage of it, to lose any thing that belongs to me, does not, as lord Holt says, in *Raymond*, 171, put me in that situation, unless the king does avail himself of it. As I said before, though I stand out upon an exigent, if no outlawry is pronounced upon me, I am not an outlaw. Suppose then the judgment had been followed up with a seizure—still your lordship's question becomes the more important, how does the seizure affect you? I will suppose it affects me, as my learned friends will suppose it does; namely, that if I do not come in pending the term, I come too late to replevy; but then the king must put me out of the power of replevying, by a final judgment.

I was asked, in the court of King's-bench, "is it possible to replevy a judgment?" I was not prepared to answer it then; I am now prepared with a body of authorities, which it is impossible to pass by, or to meet; I say, that in every one instance, throughout the whole law, wherever there has been a judgment final, there has been a judgment *quousque*—a seizure under that judgment *quousque*—a return of the sheriff that he has made that seizure; and then, in consequence of the defendant not coming in, when the court has notice, that he is aware of the seizure, then they pronounce judgment *final*; the consequence may be as my learned friends chuse—I am not in that situation.

In every instance where there are these writs, the sheriff is commanded, as in Quadryng's case, that he seize the franchise; what is he to seize it for? he is not to account to the king for the profits, as on a judgment final; but he is to seize the franchises, *according to the form of the judgment*. That is, "according to the form of the judgment, until the court shall further order." The sheriff then enters and seizes; he makes a return to the court, and then—

Lord Chancellor. If it were a franchise productive of profit, upon a common distringas, as the king taking forty shillings, and so on; would not the sheriff account to the king?

Mr. Erskine. They are returned to the party upon appearance.

Lord Chancellor. They are to compel appearance; but, I apprehend, as long as they remain to the sheriff, under the distringas, there is no judgment of returning again; they are never returned again.

Mr. Erskine. I now come to the judgment of the court of King's-bench; and I have already, for the judges who pronounced it, testified my great and high personal respect; and indeed I build much of my hopes of succeeding here, on the acknowledged learning and ability of the judges of that court; for not only from the learning and ability of all of them, but from the extraordinary researches and diligence which render ability so often highly useful to the public, when they are found coupled with learning, I raise a strong hope, that there is nothing but those authorities which the court, in compliance with those forms which are highly beneficial to the subject, have communicated as the foundation of their judgment.

Mr. Justice Ashurst, in pronouncing the judgment of the court, said, that he would state those authorities upon which the court relied, as being the strongest, and having the most reason on their side. Surely it is matter of great advantage to me, upon looking into that judgment pronounced by persons so eminent for learning, to find, that with all the research which accompanies, unquestionably, that learning, only two authorities can be found; and it is my duty to see whether these authorities press upon us—whether they bear directly upon the point which is to be considered—and whether, if they do, they have more reason on their side than those which your lordships have heard at this bar.

When we come to examine these two cases, we find they are 2 *Inst.* 282. and the case of the King against Quadryng; I may consider these as one authority, for it appears that lord Coke builds what he says in 2 *Inst.* 282. upon the King against Quadryng; and it won't be in the least necessary for me to combat the great authority of lord Coke, because, after all the application that I have given to this subject (and I am sure it has not been little) I cannot find how this authority of lord Coke bears upon me; it seems directly the contrary; for it seems to shew that a replevy is of right; which replevy the corporation of Chester never had, nor ever could in the nature of the thing have.

Lord Coke says, "by this it appeareth, that a descent of franchises doth put the king to his writ of quo warranto; which writ is here expressed; and note that the quo warranto is in nature of the king's writ of right, for franchises and liberties." One sentence before the place that they rely upon, "wherein judgment final shall be given, either against the king, for the point adjudged, or for the king."

After he has stated that the conclusion of such a suit is as it must necessarily be, he says, "*Et si non venerint, &c. præcipiatur vicecom' quod faciat eos venire &c. quod si non venerint, &c. fiat sicut in itinere justiciariorum.*"

Now before we inquire what is to be done *in itinere justiciariorum*, let us see what is to be done by the court, "*Et si non venerint, &c. præcipiatur vicecom' quod faciat eos venire, &c.*" Why the sheriff has had no command in this case—if the defendant does not come in, he is then to command him to come in; and how? Lord Coke begins his comment thus, "If, before the justices in eyre" (and here I stand or fall) "If, before the justices in eyre, the party come not, the franchises should be seized;" not adjudged to be seized—they were seized—how? "mine

"*mine districtionis*;" which is a judgment of distress;—a man must be driven to distress, I should think, for such an argument; a distress is a thing that touches me—that takes from me what I have, or deprives me of the exercise of what belongs to me;—what is *nomine districtionis*? a seizure, "which the party, in the same eyre, might replevy."

A replevy is something that you are to do with the sheriff—the sheriff is to return you back, and you are to come to the court, as your lordships will by and by see York did, and get a writ of restitution, after the sheriff hath returned to the writ that he had seized. Lord Coke goes on and says, "if the party did not replevy them while the eyre sat in that county, the franchises were lost and forfeited for ever." If a great writer on the law, were to say, that if a person does not answer to the king's process, he shall lose his liberty, and his life—if he was describing the law of England to a stranger, he would so describe the consequence of outlawry; but what signifies a man's standing in a situation to be outlawed, unless there is a formal, solemn judgment? for judgments must be formal; unless they say, *ut abinde excludatur* it signifies nothing.

How this should find its way into a judgment which places me at your lordships' bar, amazes me! Lord Coke goes on and says, "and so it is in the court of King's bench, if the party come not in upon the *Venire Facias* during that term, and replevy his franchises, they be lost for ever, and therefore we concur not with that chief justice who said, that non-claim of liberties before justices in eyre lost the liberties; for that (saith he) was but of the King's grace to grant a replevy of them, and not of right; for this opinion is against the authority of our books, and the continual practice before the justices in eyre." It is not of the King's grace to allow me to replevy; it is my right, and so he differs from that chief justice, who, in contradiction to all the authorities in the books, and the practice before the justices in eyre, laid down the contrary.

How, in the name of the law of England, and of common sense and reason, has this corporation notice of this judgment? for the king may remit his suit—the King may not chuse to go on. I know he has summoned me, and I know I have not appeared, and that therefore, if he chuses it, he may have judgment *quousque*—and then, if I am in contempt of the writ issued by the court, in consequence of that judgment, and there be a limited time within which, if I do not replevy, the King may take advantage of my forfeiture.—Now forfeitures are in all cases odious. I have often heard the noble lord, under whom I have practised many years, say, "In a forfeiture you must hit the bird in the eye." If the party has done any act by which it might be cured—if it is not taken advantage of—if you are not direct and formal in every part of your proceeding, the court will not help a forfeiture.

There is another principle of English law equally agreeable to the constitution, and which I am sure your lordships will not deny the benefit of;—that all acts of grace and favour flowing from the crown, are to flow in the greatest amplitude, and are to have a liberal construction;—that whenever an act of forfeiture is to attach, your lordships will have a strict construction. Then what is to be said to me, who ask no liberality of construction? who only stand upon the law, without the strictness that belongs to forfeiture?

I contend that, upon every reason and analogy, I am entitled to say, this corporation was never touched. Lord Coke, besides this, says, that this *Quadrang's* case is said to be a judgment. I find in the book that which *prima facie* is a judgment; but every one circumstance belonging to it has been mistaken. How could this be a judgment which forfeited the franchise, as stated in that book, when we find the process going on to the second year of the following reign, when it abated by the death of the party?

So that your lordships see this has been a case that has haunted the law for ages—it has haunted Lord Coke—it has haunted the court of King's-bench, who have made it the foundation of their judgment; they are not answerable for it—it is a mistake—it is not to be supposed that upon every judgment the records themselves
are

are to be searched; but the records being searched, and the case being found, we lay it before your lordships; and I now state it as an authority for myself to defeat the argument on the other side of the bar. I wrest my adversaries' weapons out of their hands, and they perish by them—for this is the clearest argument for me, inasmuch as this market was not forfeited by the *quousque* judgment, which was considered to be the case as reported in the year-book.

I have a case now, that I hope will make a considerable impression upon your lordships, which is that of the city of York.

Lord Chancellor. Where is the case?

Mr. Erskine. We have it from the records themselves, which shall be at your lordships' command.

Lord Chancellor. I shall be obliged to you if you would be so good as to argue from the records, to save the trouble of searching to make copies of them.

Mr. Erskine. I have cited but one case from any record yet, which is that of Malmesbury, and that of the journal of the House of Commons; no others have I cited. If your lordships should think proper, it shall be laid before you. The title which the defendant pleads is a charter of Charles the second, in the 37th year of his reign. This information, filed by Sir Robert Sawyer, was in Hillary the 35 Charles II. The like information was filed by the Attorney General against York. In Hillary the 35 and 36 of Charles II. there was this judgment *quousque* against Chester, the operation of which we are seeking to defeat. There was, in the Easter following that Hillary, a similar judgment *quousque* against York. Here the suit against Chester ended; his Majesty never proceeded further—and there is a remarkable thing, that this new charter was granted the fourth of February, in the 37th of Charles II. in the year 1684, the charter under which the defendant pleads. It is matter of history, which undoubtedly I may refer your lordships to, it is undoubtedly notorious that Charles was struck with an apoplexy two days before, and died two days after this charter.

In the first of James the Second, a new charter was granted to York. The proceedings went on against York, tho' they went on no further against Chester.

It appears that in Trinity the 4 James II. 1688, *four years* after the date of the judgment *quousque*, and without any appearance entered before, the mayor and commonalty, by their corporate name, appeared to the information, prayed to be restored to the liberties, which were seized into the King's hands for want of their appearance, and thereupon a writ of restitution issued, and the sheriff is commanded, to the said mayor and commonalty, the said liberties to cause to be restored.

Against Chester, for some reason or other, which is inscrutable, and which it is not necessary to pursue even in imagination, the King thought fit, no matter why, not to pursue his suit, he stopped at a judgment *quousque*, without its appearing upon this record that the corporation ever knew that there was any judgment *quousque*.

Lord Chancellor. You state in the case of York, that there was a writ of seizure before the replevin, and upon the replevin a writ of restitution.

Mr. Erskine. Yes, in consequence of the judgment of the court, that the King's hand may be removed, the sheriff is commanded that he go out of possession, which is the way that the King's hand is removed in pursuance of the judgment.

I admit, for argument's sake, that if I did not come in during the term, and replevy my liberties, it would have given the King an opportunity of getting a final judgment, and then a judgment of ouster, which put it in his power to make a new charter next day; but I say that is not enough. You must have a final judgment—you must issue a seizure—lord Coke says, that a replevy is of right. Now can I replevy if the sheriff has never seized?—a replevy, as applicable to this subject, is a prayer of restitution—it is a prayer to be delivered from a *seizure*—not from a judgment of which I have no notice, by any thing that appears upon this record.

There was an intermediate charter in the case of York; so that it might be said (and it is said here) the king may allow you to replevy, as of grace. Sir Robert Sawyer says, they submitted to the king, and all was quiet; and what the king may

may do when I submit, of grace, he may do without. But then, they say, you are elopped by the grant of the charter; because if afterwards you are allowed to replevy, that would be an act of injustice to those set up by the king, by that charter. Then I say, that the case of York is a complete authority upon this subject—I know, unfortunately for this country, that the king and the judges, as appears by the journals of the House of Commons, had but too much intercourse with one another upon the informations; but the judgments must be taken, wicked as they were, to be judgments of law. This is the ordinary judgment of restitution by which York came in.

There is but one authority more with which I can have occasion to trouble your lordships, which is a confirmation of all that I have been stating; and that is in Sir Robert Sawyer's Argument, page 16, which, I think, is so strong that I cannot avoid troubling your lordships with it; he says, "Where seizure is"—not where judgment of seizure is—"Where seizure is by award of the court, for a contempt in court, the court may admit the parties to affix and order restitution;" restitution of a judgment? No! and in every instance we have found (we have the original writs, and your lordships shall have copies of them) when the sheriff has been commanded to seize according to the judgment—where he has made returns of the writ, there has been final judgment, in consequence of that seizure, of ouster; and then the sheriff has made a return of the writs.

"So where by award of the court, on default of appearance, at the king's suit, a seizure is made, which is in nature of a distress, to bring in the party, by putting him out of the possession of the liberty, till he appear and replevy, the court (if the defendants come in time and pray it) may deliver them the possession, upon replevin, and this by the new statute de quo warranto." Does not all this proceed upon the seizure? Can this be taken for granted upon a judgment, of which the party has no notice, and upon which he cannot replevy?

But that is not all. This seems to me to be remarkable—Sir Robert Sawyer says, "before that statute, the general writ of summons to answer to liberties, as also the particular writs of summons upon the king's special suits, superseded the use of any liberty, till the justices meet on the day of return; which mischief was remedied by that statute, if they appeared not at the day the liberties were to be seized in nature of a distress, to enforce their appearance; and, upon appearance, if they demanded to replevy them, the judges might deliver back" (what never was taken in this case) "the possession of the liberties, upon security, to prosecute their claim, and answer the mesne profits, if any, in case judgment were against them"—much in the same manner as the practice is in the Court of Exchequer, upon all seizures, to this day; by the seizures the king is in possession.

Then he is not in possession by the judgment! Will your lordships confound all distinctions between judgments and executions? will you confound the order of language? will you do that, where not the petty franchise of an individual, but the being and existence of a corporation which has existed for ages, is at stake; and which was attempted to be made a sacrifice in the worst of times? Will your lordships, in these days, beat down that charter by departing even from the authorities which were contended for by the very counsel who argued for this forfeiture?

Your lordships will give me leave, with great submission, before I finish, to make a few observations;—I am very ready to admit that your lordships must decide according to the rules of law; and however you may detest the proceedings which certainly stigmatize those times—and however I know your lordships sitting here, as judges and peers, must look with horror upon those times which produced these prosecutions, yet I am not to ask that to warp your lordships' judgment. But if we were coming here upon a clear question, your lordships must say, "*fiat justitia ruat cælum*;" but, my lords, supposing that the ability of my learned friends were to make this question at all doubtful, let me see how your lordships, sitting here, may legally form your judgment in a doubtful case: I have always understood that in considering the authority of judgments and decisions, much depends upon the times

times in which they were given; and your lordships must needs believe, that those great judges who lived in those times, necessarily knew the operation that was conceived, by the law and constitution of the country, to have belonged to those decisions.

It is remarkable enough, that sir William Williams was solicitor-general to Charles II. Your lordships will find, that very sir William Williams—Mainwaring, an alderman—Streete, the mayor—and colonel Whitley, though they were excepted out of the charter of Charles II. signed, in their character of mayor and aldermen, the return to the convention parliament, after they came back into office; and it appears to me to be a strange thing, and thus I use it and no otherwise, that these people should not have known what they were doing! that sir William Williams, high in the law, should not know what it was that enabled him to boast of being an alderman, as he did when he sat in the house! that colonel Whitley, who sat in the House of Commons, and was an alderman of Chester, who signed the return and that sir William Williams, who was afterwards speaker of the House of Commons, should not know what they were doing!

Your lordships will find a mandamus, directed to the mayor and citizens of Chester, and a return of the charter of Henry VII. The argument on each side was conducted by sir William Williams, and sir Thomas Powis, the attorney-general, who seemed, as I see by the report in Comberbach, to do every thing but fight upon the occasion. They never said that this charter of Charles II. was the subsisting charter, but that of Henry VII.

In a contested election, in the year 1747, the house of Grosvenor on one side, and Mainwaring on the other, two charters of queen Elizabeth and Henry VII. was laid before the commons of Great-Britain, as the only existing charters on one side and the other, and the charter of Charles II. was never mentioned. Add to that what fell from lord Hardwicke, in the case of sir Watkin Williams Wynne, who declared these judgments illegal:—They went down to trial upon a bad bye-law. These great and wise men knew what they were about, full as well as any persons who live in these times, and with every respect I ought to maintain for this and the other court, whose judgment I am arraigning, it would be a servile compliment for me to say, that those persons were not as full judges of the meaning of acts, in their own times, as these a century from them.

Your lordships see I have the authority of all the reports of all the decisions of courts with me; I find, that when these people did act under their old charter, they thought they were doing that which had a legal effect;—I find it had such an effect, and was followed down from time to time, from age to age, with effect. I trust, therefore, I shall not be censured if I say, that the whole weight of authority, of opinion, of history, and of all analogies, are for the crown, in this case. I have only to intreat your lordships' pardon for having wasted so much of your lordships' valuable time.

Adjourned.

[February the 15th, 1790.]

Mr. B E A R C R O F T.

My Lords,

THE arguments in the cause now before your lordships, have, necessarily, or otherwise, involved questions of very great magnitude and considerable nicety; the discussion of which seems to require a great strength and steadiness, and even subtilty of understanding, much learning, and considerable practical experience. They are upon that head of law which your lordships know many persons have stiled, with no impropriety perhaps, a kind of legal metaphysics.

I shall

I shall have need, therefore, of much of your lordships indulgence, when I attempt to answer all those arguments, upon such a subject, in very plain, simple, but I humbly hope, in a legal and a satisfactory way; when I say that I propose to do it in a *plain* way, I mean to promise your lordships not follow the example which has been set me, or to attempt to vie with either of the learned gentlemen on the other side, in any efforts of eloquence. I have no talents of the kind: I certainly shall not, therefore, pour before your lordships any effusions of patriotism: the cause does not call for it; neither shall I prefer to your lordships any pathetic prayers, to take care of the constitution, for, truly, I think the constitution is in no danger.

My lords, those arts may be very excusable in the learned advocate, to whom I manifestly allude; he came *second* in the cause: he is not of talents or of spirit willingly to play a second part; but the great ground of legal argument and of reason was very much exhausted, when it came to his turn: *that* will be a considerable excuse for the course which he took; besides, your lordships will recollect, that these kind of arts are very pleasing to a client; they certainly tickle the ears of an audience, and, for any thing I know to the contrary, they may possibly cheer and refresh the advocate, whilst he is labouring at his toilsome task—something in the nature of singing at work; but, my lords, they cannot add any thing like information in a grave and dry question of law.

I will not be carried out of my way, to follow that learned gentleman into enquiries as to the expensive contests between the opulent families of Grosvenor and Mainwaring, in contested elections, *who* should have the honour of representing the city of Chester in parliament. I will not, as he has done, enquire into the contents of papers which are to be found upon the table of the House of Commons touching elections of that kind, a century ago!

And although I feel as true and as warm a veneration for the character of our great and glorious deliverer, King William, as my learned friend, or any of his friends can profess, your lordships will excuse me if I do not go along with him, in arguing this question, to consider the contents of the manifesto of the Prince of Orange at his landing; for surely the manifestos of princes, which we all know to be the political declarations of the day, for the purpose of captivating the multitude, are the very last documents of all others to which we are to look for sound principles of law, or perhaps for the truth of facts.

I have done with every thing of this kind from this instant. I hope, since there is so much introduced of it on the other side, that I shall receive your lordships' pardon for noticing it at all. I do it for the purpose of entering a protest, to which I trust I shall receive your lordships' assent, that every thing of that kind was just so much of nothing to the purpose.

My lords, this question before you, like every other, as I conceive, which is brought here by writ of error, calls upon your lordships to pronounce the law arising upon facts. What facts? Those and those only (I submit to your lordships) which are to be found upon the face of this record. To explain myself farther, but still meaning to speak with perfect correctness, those facts which upon this record have been introduced by the contending parties, well and sufficiently pleaded, and admitted, if not contradicted, or if contradicted, found and decided by the verdict of a jury, called in to decide upon those issues of contradiction.

I add to the facts so described, likewise, all those which must necessarily have been proved upon the trial of any one of those issues, in order to maintain the justice and propriety of that verdict which your lordships find upon the record: these kind of facts, and no other, can you take notice of. You are to look neither to the right nor to the left, particularly in a judicature formed of many judges, as this high court is, it is of the utmost importance to adhere strictly to this rule.

If one noble lord, in giving his opinion, should add to the facts to be found upon the record, any one that he knows to be true, or is the most notorious, and another noble lord should add another fact equally and undoubtedly true, what would be

the

the consequence? Each of those two noble lords would be giving opinions upon a different case, and each of those cases differing from that which only is brought before them in judgment, and upon which only they have a jurisdiction.

If I seem, by having said this to have laboured too much a rule which is indisputably true, your lordships will pardon me when you recollect, and when I am persuaded you foresee, the great importance it is of to my client strictly to adhere to that rule; for I think that the effect of it will be to cut off a great part of the arguments which have been made use of on the other side, inasmuch as they appear to be founded upon the assumption of facts that are not upon the record, and that cannot be considered in any of the ways I have stated to your lordships.

I am perfectly ready to admit, that the defendant upon this occasion, must stand or fall by the strength or weakness of his own plea. I should readily have admitted that, if the learned gentlemen had not had recourse to the authority which they have quoted of the *King v. Leigh*, in 4 *Burrow*, and the expressions made use of on that occasion.

I well know what a noble earl, who long presided in that court, an ornament to his profession and his country, then said; I am equally well acquainted with the expressions that were made use of by another learned judge; your lordships will know who I mean, when I describe him to be a judge of great learning in his profession, and peculiar knowledge in the department of pleadings; his knowledge could not be exceeded (and those who knew him, know that I speak truth) by any thing, but the mildness of his disposition, and the gentleness of his manners.

They have said in the most decisive terms, that a defendant, in an information in quo warranto, must stand upon his own title, and that the king has nothing to prove; obviously the king has nothing to prove; the king claims nothing for himself, but by his prerogative he has a right to say to any man in the kingdom, "you are in the exercise of a franchise, which must be derived from the crown: what is your authority for exercising that franchise?"

In the first place, I admit that an answer must be given, containing a complete and sufficient title to the exercise of that franchise; I admit that that answer, and all the facts contained in it, must be well and sufficiently pleaded: but I beg to remind your lordships, that upon the present occasion it is not necessary to aver particularly and peculiarly, every link of that chain of title; for we are not now arguing a special demurrer, in which case I do admit, that if there be a defect in any of the forms, even mere unsubstantial forms which are pointed out by the special demurrer, those objections would be fatal.

I am not even bound to defend this plea, and to defend this title, as if we were arguing a *general* demurrer. I stand upon advantageous ground; I stand in a case in which a verdict has been found, that my client has been duly elected, duly admitted, and duly sworn an alderman.

The statutes of Jeofails extend to all proceedings in quo warranto; and though your lordships well know that, yet sometimes it is useful to refer back to the origin and fountain head of any piece of law, especially if the foundation of that law be a positive legislative act, for then your lordships will be able to see directly what it is the legislature meant, and to what extent they proposed to go by the language which they have used upon the occasion.

The statute 9 Ann. *cap.* 20, *Set.* 7, declares that all the statutes of Jeofails shall be extended to all writs of mandamus and informations in the nature of a quo warranto, and to all proceedings thereon for any matter in this act mentioned. In this act, and in the preamble of it, your lordships will find mention made of offices in corporations: the present franchise is undoubtedly an office in a corporation: the present proceeding is undoubtedly an information in the nature of a quo warranto; it follows, therefore, that every statute of Jeofails preceding the statute of 9 Ann. which I am now stating, is to be applied to proceedings in quo warranto, exactly in the same way as they are to be applied to civil proceedings.

Now that statute of Jeofails, as I conceive, applies directly to rescue the present plea from the doubts and difficulties which (your lordships' will pardon me if I say) are only alarming upon account of the quarter from which they fell. I know your lordships will pardon me, because it was nothing like an opinion which was given, but it was doing that which ever well becomes judges to do, and for which parties and their advocates should be always thankful, as I do assure your lordships I am; that is to say, that if any point in the beginning of a cause occur to any judge as fit to be considered, it becomes him to state it to the parties at the bar, in order that the advocates may be fully heard to that point; that the judges may fully hear what can be said on one side and the other, and that the parties may be satisfied; and that they may not have to say, that the cause has been determined upon a point which they were not aware of, and to which they had not been heard. I am perfectly satisfied with your lordships' conduct in that respect; at the same time I am so well satisfied of your lordships' mind on that subject, that though it fell from one of you, you will permit us to treat the doubt with every kind of liberty and freedom.

The statute of Henry VIII. is one of the statutes of Jeofails applicable to this case. Will your lordships recollect how long ago this statute was enacted? and mark the good sense even of that old time, which was shocked (as your lordships will see by the preamble of that statute) at the practices which took place, and which were the destruction of justice, and the disgrace of the administration of the law.

My lords, the statute recites, "That parties, after vast expence, have gone down to trial, and that verdicts were found, and that issues being misjoined and jeofail, and sometimes by taking advantage of the parties own mispleading, or in the pursuing, miscontinuing, or discontinuing of process of any of the parties, and for divers other causes" that are stated here, which I will not spend your lordships' time in rehearsing, "were forced to begin again, the which is thought as well a great slander to the common law of this realm, and to the ministers of the same; as also a plain delay and hindrance unto the said parties, when issue has been found and tried as aforesaid."

Now comes the cure.—"If any issue be tried by the oath of twelve or more indifferent men, for the party, plaintiff or demandant, or for the party, tenant or defendant, in any manner of action or suit at the common law of this realm, in any of the king's courts of record, then the justice or justices by whom judgment thereof ought to be given, shall proceed and give judgment in the same; any mispleading, lack of colour, &c."—(then there is a list of things which are gone through, which shew what sort of objections did obtain in former days; and then it goes on in these words;) "or any other default or negligence of any of the parties, their counsellors or attornies, had or made to the contrary notwithstanding; and the said judgments so to be had and given, shall stand in full strength and force to all intents and purposes, according to the said verdict."

This is strong language in the statute; the meaning of it cannot be mistaken; the judges who have construed it afterwards, as I shall shew your lordships, by a case or two, for the purpose of proving the principle—have pursued the direction of it correctly.

There is a case in *Croke Charles* 497, which states thus:—"If the declaration omits that which was necessary to be proved, otherwise the plaintiff could not recover, this shall be aided by a verdict for the plaintiff; for a plaintiff in an *assumpsit*, reciting that the defendant had sold all the furzes on such land, to be taken before such a day, the defendant promised that the plaintiff should not be disturbed in carrying them away, the plaintiff does not say in his declaration he was disturbed before such day, yet this is aided by the verdict."

Now your lordships see, that declaration was defective in a main part of the case; he had no right complain that the defendant had broke his promises, unless he shewed that he was disturbed *within the time* that by the contract with the defendant

defendant was given him to take away these things ;--that is omitted, yet after verdict it is supplied ;--Why ? Because the plaintiff is taken not to be able to recover the verdict which he did recover, without proving that at the trial, though it was not alledged in the declaration. Perhaps even here I may be thought to trespass a little upon your lordships' time in quoting any case to prove that kind of rule ; one case shall suffice.

I can refer your lordships to a string of cases in *Cumyns Digest*, title *Pleader* 55, and following pages, to prove the same position ; which rule I take to be, as I said before, that wherever there is a verdict finding a particular thing, every thing which was in point of law necessary, in point of fact to be proved to entitle the party for whom that verdict is found, in law and in justice, to that verdict, should be supposed to be proved at the trial ; and a court, in giving judgment, shall take these facts as strongly as if they were specially and particularly averred upon the pleadings. That is the way in which the rule strikes my mind, and in which, in the little experience I have had in the profession, it has been constantly applied.

Though I have, in doing my duty to my client, thought it incumbent on me to crave in aid the statute of Jeofails, because he is entitled to the assistance of it ; I am very serious in submitting to your lordships, that we don't want it upon the present occasion : but that, reading this plea, and scanning it with a legal eye, your lordships will find an averment of the existence of that legal mayor--that legal set of aldermen--and legal set of common council,--a majority of which are necessary by the charter to concur in a good election ; and, if I understood your lordships, the doubt of the averment of the existence of these several persons, at the time of the election, was the doubt which struck your lordships' mind.

Will your lordships permit me to read the averments of the plea ? It shall serve once for all, tho' I may have occasion, by and by, to refer to them again. The plea states, that the city of Chester was, by letters patent, in 37 Cha. II. created a corporation, with power to have a common seal ; to have a mayor, twenty-four aldermen, forty common-councilmen, and several officers, which I need not mention. It directs that the mayor shall be elected out of the aldermen by the mayor, aldermen, and common council, or the greater part ; it makes by name twenty-four aldermen ; it directs that there always shall be twenty-four aldermen, of whom the mayor and recorder are to be two ; it directs that the election of aldermen, on death or removal, is to be by the mayor, the residue of aldermen, and common council, or the greater part of them ; and then there are directions before whom the officers are to take the oaths.

Then the averments go on to state, that the charter was accepted ; that the twenty-four that are named, became aldermen ;--that is specially averred. And then it goes on to say (this is the material part) " that the defendant, upon the first of March, 22d George III. was a citizen, and one of the common council of the said city." It states him to be, at that day (which your lordships see is averred to be the day of his election) one of the common council of the said city.

Then it goes on to say, " and the defendant, so being a citizen, and one of the common council of the said city, and inhabiting there, he, by the major part of the then mayor, aldermen, and common council of the said city, in the common-hall duly assembled, was lawfully and duly elected one of the aldermen, in the place of one Thomas Attle, one of the aldermen, deceased." Then it is stated, that he was sworn on the first of April following, before Pattison Ellames and Joseph Snow, who were the persons before whom the oath was to be taken. Then it is found, as I stated before by the verdict, that he was duly elected, admitted, and sworn.

Before I make a short observation or two upon the latter language of this plea, which I contend to contain, independent of the aid of the statute of Jeofails, clear averments of the existence of a legal mayor, aldermen, and common council, at the time of this election ; your lordships will permit me to quote one case, which,

as it seems to me, gives the rule what shall be taken to be an averment with great clearness, truth, and good sense. It is a case in *Lutwyche* 1172.

Now that is a strong instance that where a thing is stated and averred upon the record, and it is necessary to imply another thing, which is not stated, in order that that which is stated and averred should be true, your lordships will see in the language of this case what is stated implies that to be which *is not* stated, and therefore you are bound to take it to be so.

Your lordships will be so good as to observe, that I am now stating a case which stood upon an objection not cured by the statute of Jeofails; but it is a case stating the nature of averments of facts in general. This case was a great many years ago; but with respect to all objections of this kind, your lordships well know, that in a course of years, down to the present time, much more liberality, and much more relaxation of a strict rule, has been constantly introduced. I am myself old enough to remember when it was doubted for a while, whether an averment of a thing, or a man being so and so, was an averment that the thing or man was so and so. No man doubts that now to be a clear thing; and I take it that the rule in the book here is, that, wherever a thing must be implied, it must be taken to be so.

Let me apply this doctrine very shortly to the averments which I have recited at the conclusion of this plea. He says, that on such a day he was one of the common-council of the said city. Could he be one of the common-council of the said city on that day, unless there was a legal common-council of that city? That so being one of the common-council of the said city, he was chosen by the major part of the then mayor, aldermen, and common council of the said city.

Could he be so chosen by the major part, unless there did exist at that time a mayor, a sufficient number of aldermen, and of common council of the said city? It seems to me that the facts, which he has averred in plain terms, necessarily imply the other facts; and without the assistance of the statute of Jeofails it is sufficient. But the statute of Jeofails, no doubt, does away all objections; for before a verdict can be found (and it has been found that he was duly elected) it is necessary to prove, that there existed, at the time of his election, a sufficient number of legal electors.

I shall leave that point, in a humble confidence that I have satisfied your lordships—that either it is sufficiently averred without resort to the statute of Jeofails, or by the aid of this statute your lordships must take it to be averred. If then I have succeeded thus far—that upon the face of our own title it is sufficiently apparent, either by averment or by the facts which your lordships must aid by the statute of Jeofails, that he has a good title, I mean to follow the questions in the natural order as they arise without formal division, as being more perspicuous.

The next question will be, whether any thing has been introduced by the pleadings, on the part of the prosecutor, that vitiates and destroys that plea?

The first course taken on the part of the prosecutor, to destroy the effect of that plea, is this;—they disclose more of the contents of this charter of Charles II. than we have done; they state the reservation by Charles II. of a power, by order in council, to remove aldermen and common-council—I won't say *how many*—that will be a matter of argument by and by. They contend that the meaning of that reservation is manifestly reserving a power to remove, at one stroke, if the King so pleases, all the aldermen, all the common council, and all the officers.

If that be the meaning, undoubtedly it would be followed with the total destruction of the corporation; and I am extremely willing to concede that the learned gentlemen on the other side are right in the argument they put, that if that be the meaning, such a reservation would be illegal;—but I deny the consequence which they would attach to it.—They only introduce this reservation for the purpose of poisoning and destroying this charter; and they would take it for granted in argument that the introduction of this illegal clause (taking it, as I now take it, to be perfectly illegal) draws down the charter along with it, and utterly destroys it;—that is the argument.

I deny

I deny that position; it is not true even in the case of a grant from the crown of matters of interest—it is not always true, that if the King be mistaken in law, that should avoid his grant. It is certainly not true in cases of charters for public and general purposes, and grants of the power of being a corporation; which your lordships see is a very different business indeed from grants of the crown parting with any of its possessions.

I will consider, very shortly, one or two of those cases which the learned serjeant has quoted in support of this position—that an illegal clause in this charter vitiates the whole charter—and I will then state a case or two on the other side, with the reasoning upon it.* The case which the learned serjeant referred to very shortly in *Coke*, of *Alton Woods*, is an exceedingly long case.

Now all that I learn from reading that case (and I have read it carefully) is, that where the King is mistaken, either in the sort of estate which the grantee gives to the crown, as a consideration for the crown's grant—or where the King is mistaken in the sort of estate and interest which he means to give, for that he is seized of such an estate, and cannot do it—in either of these cases the grant is void.

And the case goes farther on to say (which I am perfectly ready too to admit) that the words (good sense is wanting perhaps in them, and I therefore shall not argue much upon them) *ex certa scientia et mero motu* in a patent, though very favourable words, shall not make the grant operate against the King's manifest intent; I admit, if it appears that the King, in granting away the interest and property of the crown, does not know what he is about; if he does not know what he receives as a consideration, and what he grants in consequence of that consideration, that notwithstanding the words *ex certa scientia et mero motu*, it shall be void—I admit it, for it will not touch the present question.

Another case which the learned serjeant quoted lays down the rule, as it seems to me, much better, and upon a truer principle; that is the case in Hobart 223—*Needles v. the bishop of Winchester*; which was a grant from the crown of a rectory.—There the rule is laid thus. If it appears in the body of the patent that the king errs in his judgment to his prejudice, which I take to be the principal point, then the grant shall be void.—I admit that rule fully and freely.

My learned friends have then recourse to one other case, that is the modern case of the *king v. the vice chancellor of Cambridge*, where lord Mansfield makes a difference between a charter of incorporation to persons not a corporate body, and a charter of incorporation to those who are, prior to that time, a corporation. His lordship seems to think that in the first case, citizens and inhabitants, for instance, who are not a corporation, are bound to accept the whole of the charter, with all its conditions, and all its circumstances, or else to refuse it entirely: his lordship seems to think too, with respect to a new grant of a new charter to an existing corporation, that they may if they please (though a dozen different circumstances are put in the new charter) take any part or any one of them.

There is no body upon earth that speaks with greater, and more feeling deference as to every thing that fell from that mouth, than I do; but, for that position there is no authority quoted, and I speak in the hearing of those who know whether I tell truth or not, but I must say that ever since that position was laid down, and whenever it is quoted, as very frequently we know, in point of practice, it is quoted; it does not receive the assent which almost all the other doctrines of that learned lord do receive, I mean to say that the general opinion of the profession (if I might venture so to say) upon the Bench, and at the Bar universally, doubts at least of that position.

But if it were taken to be so, yet I beg leave to say, that when it is said if there is a grant of the capacity to be a corporation to you, who are not a corporation, you must take all that is put into your hands or none, it must mean all *legal* circumstances; it does not mean that if in a long grant there may be something illegal, (Lord Mansfield has never said, and no lawyer undoubtedly has ever said) that you cannot take all the facts, if I may so call them, which are given in that charter, leaving

leaving that which is illegal, and which happens to be mixed up with it. I say there is no authority for that; your lordships will see by and by that I shall be able to produce something like cases, and a great deal of sound reasoning to shew that it is so.

I come now to a case, which in my mind lays down the rule about grants of the king being avoided by ignorance in the crown with great clearness, and with strong reason; laid down too by a considerable authority, in the presence of one of the greatest authorities that we know in the law, upon points of law and not contradicted by him who concurred with the judge in the opinion I am going to state.

Your lordships will find the case to be the *King v. Kemp*, 12 Mod. 78. It was a *scire facias* to avoid a patent—it is immaterial to state the peculiar circumstances—I quote it for the sake of the rule which is laid down by Mr. Justice Samuel Eyre, and not contradicted by lord chief justice Holt, who concurred with him in judgment for the defendant. Lord chief justice Holt was of a knowledge and of a temper, that if any judge, sitting upon the same bench with himself, had said, that which he did not think to be the law, he would not have been restrained by any politeness from saying, that it was not law. I am sure your lordships, who have read many of his decisions, must have observed that he had that disposition about him, which might very well become a judge, though perhaps not so well become the manners of a gentleman.

Now my lords from the authority, which in this cause explains the rule at large, have not I a right thus to state it? If the King is mistaken in law, if he should be mistaken in some facts not to his prejudice, not to his loss, not to the diminution of his estate, and his property, which is given to him for public purposes; or, if those mistaken facts are not upon the suggestion of the grantee; in that case the grant shall not be void; and I beg your lordships to remember, that I am now talking of the doctrine as applied to the grants of interest, estate and property. Your Lordships will mark, by and by, a very important difference between these and grants of corporations.

It would be very strange if it were insisted that in this charter, the King's mistake of the law (as I admit he had mistaken the law) should vitiate it. Why should it vitiate it? Are there any of the reasons stated in the rule that I have just quoted? Does that mistake of the law arise from any suggestion of the grantee? Certainly not. Is the king prejudiced by it? Certainly not. Is the public prejudiced by it? Certainly not;—the public get an existing corporation for the purposes of good order, peace and government; it is for the interest of the people; it is for the honour of the king, that that illegal attempt should be rejected, if indeed the king meant it. But I think I shall demonstrate to your lordships that such was not the meaning of the reservations.

Might I be permitted to observe, that such a construction as this (that is to say that wherever you find in a charter of incorporation any thing illegal, it shall vitiate the whole grant) might be a sort of temptation to bad law-characters about the crown to insert illegal parts, in order to tempt people to accept the charters for the good that is in them, together with the bad; and then, if at any time they should prove refractory, to say—"Oh! the whole charter is bad, for this matter is against law:" it seems this construction would be attended with that danger.

But I am very little solicitous to maintain this point. I mean to say, that this reservation (taking it to be a reservation of power to remove all the aldermen and common council) is illegal; but, that it does not vitiate the charter, because I am persuaded that I shall, in the course of a very few sentences, give your lordships perfect satisfaction that such was not the meaning of the reservation.

Upon that head I shall ask nothing of your lordships, but what I am sure you will concede to me. I ask you to read the words, construe them according to the natural import, construe them according to the rules of grammar, construe them according to the rules of law, in every way of construing that reservation, I am persuaded your lordships will find it to be—not a reservation of a power to remove the whole,
and

and thereby to stop the activity of the corporation, but a reservation perfectly legal, and perfectly consistent with preserving the corporation and the activity of it.

In order to be quite sure of my ground, I will beg to trouble your lordships with a very few words of that reservation; after observing to your lordships, that it appears by our plea, that the king purposes to make the citizens and inhabitants of Chester a corporation *for ever*—for that is the language,—and to grant to them and their successors *for ever* certain franchises and liberties, which at the outset import, that one meaning of the crown upon that occasion, was to give perpetual succession. I trust that observation will be material in the construction of it. After laying in my claim to that clause, I come to the reservation itself.

The crown reserves full power and authority. “The mayor, recorder, common clerk,” “*or any one or more of the aldermen, common council men,*” &c. naming them, “by an order in privy council made, to them respectively signified, to remove and declare them, or any of them, to be removed accordingly, and that as often as the King by any such order, made in privy council, should declare any such mayor, recorder, common clerk, *and any one or more of the aldermen—*”

I dwell upon these words, to mark to your lordships’ notice, that the king did not mean *all*, because if he had it would have been perfectly easy to have said *all*; he does not say one more or *all* of those persons, naming them, but he says only “one or more.” Then the question will be how many more? How shall we get at that? Why you must get at it by getting the intention of the crown from the several parts of the charter, and construing it according to that intention, as far as you possibly can, to give it effect.

In the first place it is not likely, when the King has set out with saying, “I mean you to be a perpetual corporation,” that the next moment he should say, “I mean it shall be in my power to put an end to you to-morrow:” but, if any man can doubt about the intention, your lordships will see plainly by what follows afterwards, that it was not his intention, but that he meant only to have a power to remove one or more.

If it be asked, how many more? I say still, so many more, as that the corporation might maintain its activity; because he goes on to say, that whenever such amotion takes place (what amotion? Such an amotion as the king makes by virtue of this power) in every such case other fit person, or persons, within a convenient time after any such amotion, or amotions, should be chosen, sworn and appointed, in such manner, as by the said letters patent was before directed.” Your lordships will recollect what that manner is, that it is by the majority of the mayor, the aldermen, and common council.

It is manifest, therefore, as to this power of amotion, that the King could only mean an amotion of one, or more, to such an extent that the places of the persons might be filled up according to the provision of the charter; which is, by leaving a majority of mayor, aldermen, and common council to do it. I trust, therefore, that that is the fair and reasonable import of the language.

I did venture to ask your lordships to look at it, and see whether, according to the laws of grammar, you should not so construe it;—if your lordships look at it in that view, you will see it is, that the King shall have power to remove and declare them; what them? *Proximo refertur antecedente*, “any one or more,” that is the antecedent to the word *them*, if therefore the king had meant *all*, in that place antecedent to *them*, you would have found the word *all*; for, if the King meant to reserve a power to remove all, what was more natural than for him to say, at once, “I mean to reserve a power to remove one, or more, or all?”—he has not so said: I contend he could not so mean, consistent with his first general purpose, declared at the outset of the charter, which is to create a corporation perpetual.

I said I would ask your lordships (and which is more important perhaps upon the present occasion) to construe the meaning of this according to the rules of legal construction; and I think I can quote to your lordships, from the very best authority,

urity, two rules of construction, which are decisive upon this occasion; it is a little remarkable too, that the first rule will be out of that famous case of my antagonists, *Alton Woods*, which case I dare say my learned friends turned over and over; some how or other it did so happen, that this rule never struck their eye; it is in 1 *Coke*, 45. The rule is this; if there may be two constructions of the king's grant, one which may preserve it, and one which will make it void; then it shall be taken according to that intent which will make it good. That is laid down as a clear rule of law. This rule is repeated in the very words again in 10 *Coke*, 67 B. adding the reason of the rule; and certain it is, that it is extremely convenient and satisfactory, when you find a rule laid down by authority, and that authority condescends to give the reason of it; the reason is here added: "It is for the King's honour, and for the benefit of the subject, that such construction should be made as that the King's charter shall take effect, for it was not the King's meaning that his grant should have no effect."

Then the reasons for this rule are, you are to consult the king's honour; you are to consult the benefit of the subject. Is it for the King's honour unnecessarily to suppose, that he meant a reservation for the purposes of tyranny, despotism, and undue influence? It certainly is not. It is for the King's honour, therefore, that this reservation should be construed in the way that I contend it ought to be construed.

Another principle is, that you should construe it for the benefit of the subject. Is it not for the benefit of the subject, that you should construe it with this meaning, which will make the charter legal, and which will erect and preserve to all future times (at least as long as it will preserve, unless forfeited by misuser or some accident) a corporation for the purposes of good order, peace, and government?

It seems to me, upon this legal rule of construction, and the principles upon which the rule is founded, the King's honour and the benefit of the subject, that your lordships are called upon, in a manner which you cannot refuse, to construe those words according to these rules for the King's honour and the benefit of the subject, agreeably to the nature of the case, and agreeably to the rules of grammar. Then there will be no occasion to consider whether the illegality of that clause will vitiate and draw along with it the destruction of the whole charter; because then you will have a reservation consistent with law; then the whole charter will be good, and may be accepted.

Having, as I conceive, established two propositions; first, that the learned gentlemen on the other side are mistaken in their point of law, when they say, that an illegal clause in a charter of incorporation will vitiate the whole:—Secondly, that they are mistaken in point of fact, when they say that the meaning of it was to reserve a power to amove the whole, which I agree would be illegal:—I beg leave to ask the learned gentleman, what is become of that boasted *dilemma* of his which he supposed he had driven us into? Said he, "it is either illegal, or it is legal; if it be illegal, it destroys your charter; if it be legal, there is an end of it, for King James II. has signified this order of amotion in the regular way, by his privy council, and the signification of it is found by the jury." I say of that same dilemma, that his horns are blunt and harmless, for the learned counsel begs the question in point of law, which I contend is not the law, that if this clause be illegal, it would vitiate the whole charter: and he begs the fact of its being a reservation of power to amove the whole, in order to make it illegal.

A great genius like himself, who lived about two thousand years ago, went to work precisely in the same way, one *Archimedes*; he says, "if you will give me a point on which I can stand, I will move the world;" but as he could not find that point, the world remains just where it was; and as my learned friend cannot possess himself of either of the two points of law, or fact, I verily believe the charter of Charles II. will stand, notwithstanding this frightful dilemma, which I believe now is vanished into air.

I come

I come now to a little bit of an argument which the gentlemen have thrown in by way of assistance, but which they do not seem much to rely upon; they say that it is found (and it certainly is) that the order of amoval, by James II. was signified. "Now," say the gentlemen, "hereby they were all-amoved; that is the consequence in point of law." My answer to that is, if the power reserved was illegal, as they argue it to be, this same order had no effect; if it means to amove *all*, the consequence is, that it is perfectly in vain, and will have no effect, for the king has reserved no such power.

They come then to another curious argument; they say, "be these these things" as they may, yet, upon this record, your lordships must take it for granted, that "all the aldermen, and all the common-council were *in fact* removed by the order of king James II." Now let us consider a little what, if any thing, is meant by that sort of expression; they must mean this, that whatever the operation of that order of amoval might be, in point of law, in fact and in truth the aldermen and common-council gave way to it—in fact, that this order put them completely to flight.

They say that they were all amoved; that then it must be taken to be true that the defendant's election is bad; for long before the election of my client—that is to say, at the time of the order of amoval, by James II. "all your aldermen and common-council took fright and fled, and have not been seen since; and so there could not be a set of aldermen and common-council to chuse him."

There my learned friends have assumed what they have no right to assume; they have assumed that it is averred, that the mayor, aldermen, and common-council, were in fact amoved: I say, no such thing is averred—if it had been averred, and not contradicted by us, it must have been taken to be an indubitable fact. Your lordships will see, that at the end of all the names of aldermen and common-council, it states the order of amoval, as signified to them by name, runs over the names, and then goes on "and thereby they and each of them, severally and respectively, became and were amoved from their respective offices and places of aldermen and common-council-men before-mentioned."

Now I say, that is not an averment of fact, *distinct from law*, that they ran away and deserted the place; it is no such thing; it is a conclusion in law, which they draw from their construction in law and in fact, of the meaning of this charter; because if that power was reserved to amove all, and if that power was illegal, and it was signified in this way, then undoubtedly, by the terms of the charter, they were thereby *ipso facto* amoved; but I submit to your lordships, with great confidence, that this is nothing more nor less than an averment of law, which does not signify a farthing, unless your lordships are of opinion that it is law.

What is the next averment? "Wherefore the said last-mentioned letters patent, as to the election of aldermen of the said city of Chester, ceased and determined."

I remember a learned gentleman said, "it is strange if one of these two averments is not an averment in fact;" because otherwise his argument was, there would be *two* averments in law. What signifies if there were two hundred? What could my learned friend be thinking of when he chose to take for granted that there might not be two averments of law, one upon another? You can't mount a fee upon a fee, if that is the sort of thing he was thinking of; but I call upon the learned serjeant to shew, in reply, why they may not insert in their plea, if so disposed, half-a-dozen averments in law; I contend, therefore, that this is a mere averment in law.

But it is not true, if it were an averment of fact, that it stands *uncontradicted*; for I desire to refer your lordships to that part of our plea which I argued for the purpose of shewing, that we have made sufficient averments; and if I am right in that argument, the consequence will be, that there was, at the time of the election of the defendant, in the year 1783, an existing set of aldermen and common-council.

Then how do I, on the other side, admit the fact that they were all moved in the time of king James II? If that were an averment in fact the consequence would be, that my averment, on the other side, would have been a contradiction to it, and they ought to have gone to issue upon the question averred; however, I rely upon it that your lordships will see that it is nothing in the world but an averment in point of law, and that will be perfectly sufficient for my purpose. And now I do flatter myself that I have got rid of four principal objections which they have pointed against the defendant's title, under the charter of Charles II. Those four your lordships will recollect are,

The first upon the account of the insufficient pleading, as supposed.

The second, this wicked reservation in the charter of Charles II. the wickedness of which, by the bye, they are the authors of, by introducing a meaning which, I say, it never had. Hunters lead foxes to the wood, then, with the hounds, they hunt them out again.

The third point is, the order of James II. which, I say, had no operation at all, inasmuch as it was founded upon a construction which was not the meaning, or which, if it was the meaning, was illegal, and could have no effect; and, I trust, I have answered, in the last few words, this new idea of an motion being alledged *de facto* of all the aldermen and common council.

To borrow a phrase of a learned friend of mine, when he descended from his castle into his plain;—I now do find myself about to enter the enemy's country—and I mean to consider, and to look in the face, their second replication, in which they have most shamefully, as I think, abused the power of the crown to introduce many matters in pleading; perhaps that is so frequently abused, that it would deserve the attention of the legislature; I have had frequent occasions to observe the injustice and enormous and unnecessary expence, at least, of permitting them to do so.

In this replication they are not content, as they ought to be, with introducing some single fact which would destroy our charter, but your lordships will see they absolutely fire a broad-side upon us; they first say, “here you talk of your charter of Charles II. why here is a prior corporation subsisting by virtue of a charter of Henry VII. under the seal of the county palatine of Chester! nay, what is more, this charter of Henry VII. under the seal of the county palatine, was confirmed by Elizabeth under the great seal of England!”

Then they go on by way of anticipation. The pleader smelt something with regard to this *quousque* judgment upon which so much has been said; and he chuses to introduce upon this record, the information in quo warranto in the 35 Charles II. and the judgment *quousque*, averring that the charters of Henry and Elizabeth remained in full force *before, until, and at, the time of the said judgment.*

There they stop. They never aver them to be in force *afterwards.* Then they go on to state the acceptance of the restoring charter of James II. by the mayor and citizens: and then they say, that the charter of Charles II. became void after that acceptance. They say, and I admit the law beyond all doubt, that if a place were occupied by a royal charter for the purposes of government, there is not room for the king to create a new corporation of the same kind.

I am obliged to one of your lordships for an observation which never occurred to any of us, either upon the bench, or at the bar before; but the more I look upon it, the more I see it founded in law. I see that this boasted charter of their's, which is to work such wonders, which is to do away the charter of Charles II. (because it left no room for it) which is to survive the judgment *quousque*, was only granted under the seal of the county palatine of Chester.

I do not learn that Henry VII. after he came to the crown, travelled incognito. We all know he travelled much so before. If he had a mind to travel incognito, he might travel by the name of earl of Chester. It is ridiculous that a king, meaning to grant a royal franchise, should chuse to do so, not as King of England, but as
a subordinate

a subordinate character, which I shall contend, in point of law and fact, was merged and totally sunk in the kingly character.

It seems perhaps unnecessary to quote a case to prove that the King of England can only grant under the great seal, but I chuse to go upon a foundation that is a very good one, and for that I refer your lordships to *Lane's case*, 2 *Co. Re.* 16 b.—there it is laid down by the whole court (*per Curiam* as the book says) that by the common law no grant of the king is available or pleadable, but under the great seal of England.

The king we all know cannot grant but by record. Whatever passes under the great seal of England, is a record: whatever passes in a less way, unless it be supported by some particular act of parliament (as some there are for that purpose) not being by record, does not operate as a grant, is totally void, and nothing passes from the king. Let us consider a moment—what is a county palatine? Is it not of the essence of a county palatine that it should have *jura regalia*? Was the king at this time earl of Chester?—He must be taken to be so, for he uses the county palatine seal: he would have no right, unless it was under pretence of being earl of Chester.

Then I contend, before your lordships, that in point of law all the royal franchises, all the *jura regalia* that existed in the county palatine, and which are royal franchises in the hands of the subject the moment the earldom of Chester comes to the crown, are merged and lost among the other regal rights; and whenever the king thinks proper to exercise a regal right in the county of Chester, the regal rights being in him, he must exercise them in his royal capacity.

It is for a sort of uniformity and regularity that the law directs this in matters of much less importance than the kingly character. Your lordships know that even with respect to property, wherever a particular estate is carved out—an estate in fee, the instant it comes to the party who has the inheritance, it is sunk in him;—a fortiori it is proper for decency sake, that whenever royal rights which once have been parted with by the king, recur again to the king, they should merge in his kingly character, and if he chuses again to exercise them, he shall exercise them as king.

If my learned friends would compare this with the case of the duchy of Lancaster, I have no objection: the difference is this; the duchy of Lancaster, under Henry IV. was severed by an act of parliament from the crown; but I call upon my learned friends to shew me the act which separates the earldom of Chester from the crown: so unfortunate was that reference which the learned serjeant did for a certain purpose make to lord Coke, in his 4th *Inst.* 105, about the duchy of Lancaster, that there I read, that Henry IV. severed the duchy of Lancaster by act of parliament, and lord Coke gives the reason, for he could not be *rex et dux*. I repeat his words only, *mutatis mutandis*; I say, and I will maintain, that the king cannot be king, and earl of Chester, for the reasons I have already taken the liberty to lay before your lordships.

The gentlemen, aware that some such argument as this might be made use of, were pleased to crave in aid an authority which I beg to say never existed. There sits very near your lordships, a learned person, who can tell your lordships whether I am right in what I am about to state; it was supposed that the learned judge who tried the first cause (which was about four or five years ago) determined that the county palatine seal was necessary to a grant by the king, of any thing in the county palatine.

My learned friends mis-recollect it—that is not the fact. I remember in the first trial, when we pleaded the charter of Charles II. there was an issue of *non concessit* to that, as being only under the great seal; there was an objection made at *nisi prius* (for that is a fruitful place for objections) that it was necessary to have the county palatine seal to it, for it was so specified in the grant. The learned judge who tried that cause, I remember, so far from determining that it was necessary there should be the county palatine seal, said, it was only directory in the patent, not essential to it, and we had a verdict upon that issue of *non concessit*.

Supposing that I have succeeded so far as to shew that the king cannot grant by the seal of the county palatine, when the county palatine is vested in him, but must grant by the great seal—then the gentlemen think they find a cure for this by a confirmation of the charter by Queen Elizabeth,* under the great seal. Very young persons in the law know that that which is void, is incapable of confirmation; but when I go upon the ground of law, I love to give your lordships an authority to support it. I desire your lordships to look into *Coke Littleton*, 295 b. where lord Coke lays down the rule I have mentioned, in the strongest terms, both in Latin and English; where he borrowed his Latin from I do not know, but I much suspect from the civil law.

Lord Coke begins thus; "Confirmation is, whereby a voidable estate is made sure and unavoidable, a confirmation does not strengthen a void estate." Then he goes on to say, "*Confirmatio est nulla ubi donum præcedens est invalidum, et ubi donatio nulla omnino nec valet confirmatio.*" Now nothing can be stronger than this distinction of the law, that a confirmation cannot operate as a confirmation upon a thing which in its origin was void; it can only operate upon that which may be avoided or not, at the election of the parties:—there the party may take the advantage, and say "this is voidable. I insist it is void." He may likewise say, "I waive that power of insisting, if I confirm it." I will be contented with this authority, but modern experience proves it.

Is any thing more common upon earth than this case:—A tenant for life leases for twenty-one years, and dies before the expiration of the lease, it is good as against him—why? because otherwise it would be stopping his own grant; but no act of the remainder-man can confirm it, it being originally void: no knowledge of this and receipt under the rent, can do it—it is the common practice every day at *nisi prius*.

If I am right in contending that this grant of Henry VII. under the seal of the county palatine of Chester was void, and if I am right, as I am sure I am, that the confirmation of Elizabeth, by the great seal, could not better that which was absolutely void—I say, if this point is in our favour the remaining puzzling questions about the effect of this *quousque* judgment, and of this restoring charter, are not necessary at all to be considered; however, as I cannot foresee how your lordships will determine, I must necessarily consider those questions.

I am extremely obliged to your lordships for the patient, and, if I may flatter myself so far, for the attentive hearing I have had hitherto; the only retribution I can possibly make, will be to shorten as I go on, and I trust I shall be able to finish before your lordships will think it necessary to adjourn.

The gentlemen on the other side have argued a strange proposition, as it appears to me, but they affect to believe it; that is to say, that a corporation cannot be dissolved but by the natural death of the members, or by the power of parliament; to prove that, Mr. Serjeant Adair has quoted from *Palmer*, 501, the case of *Fulcher v. Hayward*, and he says, that the king cannot dissolve a corporation. I agree, that if the king has granted to certain persons to be a corporation for ever, he cannot resume that grant—he certainly cannot come at any time, and say, "It is my will and pleasure to revoke that grant," but it does not follow that by no possibility a corporation can be forfeited and dissolved.

In the case of *Fulcher v. Hayward*, your lordships will be so good as to observe, that there was no determination upon any such point of law as relates to a question of the dissolution of the charter, for if your lordships will look at the end of the case (and it seems the only part that need be looked at for this present purpose) you will find judgment given for the defendant, for the uncertainty of the special verdict, not at all upon any question whether a corporation might or might not by any possibility be dissolved.

In that case there is a great deal about the case of the Dean and Chapter of *Norwich*, and their surrender of their church, their liberties, and their possessions. And it was contended, and I am free to admit, that it might very well be said not

to be a surrender of their franchise of a capacity to be a corporation. The surrender of their house—of their church—of their lands—is a surrender undoubtedly of a great deal; but it is not a surrender of their power of being a corporation.

I appeal to your lordships, whether it is not a constant notion of every lawyer, that a corporation may surrender, and that is the ground of a new charter. It has been the constant practice at all times almost, when a new charter is granted, that there should be a surrender of the old one. I do not mean that it is *absolutely necessary*, because an acceptance of a new charter, which is totally contrary to all the provisions of the old one, would be putting an end to it. Why may not a corporation, a political creature, surrender up its existence to the crown its political creator?

Is there any thing strange in this? Is it not strange, if this cannot be? that is to say, that if all the persons interested in this business agree, the crown who grants, the corporation who receives, who act by their common seal, cannot surrender all their liberties of every sort and kind, which they receive at the hands of the crown, into the hands of the crown. Your lordships know it is an universal principle of law, that all individuals may do so. If I hold a particular estate, and another person has the inheritance, I may by release or surrender, get rid of that estate to that person, and it is totally gone. It seems a strange principle therefore to say, that the king shall not have the same advantage that another person can have by a surrender.

I would trouble your lordships with a short case from *Dyer*, 282, and I wish to read it from the book, because the learned serjeant has really got rid of it, by a very curious course of proceeding, which I shall remark to your lordships by and by, and see whether it is of any effect. I won't tire your lordships with the whole of the case, which is in law French; but the substance of it is this—that there seemed to be two chapters within the archbishopric of Dublin; that is to say, the dean and chapter of Christ Church, and the dean and chapter of St. Patrick's.

It is stated, that the dean and chapter of St. Patrick's, under the chapter seal, surrendered to the king all their church, houses, lands, and possessions, without the consent of their bishop, being their chief ordinary; after which the bishop, it seems, makes a grant, without the confirmation of the dean and chapter of St. Patrick's, which he was used to have; but he gets the confirmation of the dean and chapter of Christ Church, which was one of the deans and chapters within the archbishopric.

The question then was, whether that was good, because by custom the bishop's grants had been used (in order to operate, your lordships know, after his death) to be confirmed by the dean and chapter of St. Patrick's. The answer to that objection was, "it is true, they did use to be so confirmed, but you must be content with the confirmation of the dean and chapter of Christ Church, because the other chapter was extinct and gone, by surrender under its own seal." This, as it appears by the book, puzzled the judges in Ireland, and they were of different opinions about it: it was sent over to this country for an opinion; and it is expressly stated in the book, "*Quia Corporatio et Capitulum Sancti Patricii predicti fuit per donum et sursum redditionem Decani et Capituli predicti legitime dissolutum et determinatum.*"

Sir George Treby, the recorder in the case of the London quo warranto, gave a good answer, says the learned serjeant, to this: That he had a manuscript report of *Dyer*, in which the Latin words were left out; *ergo*, said he (so said the learned serjeant, I believe they were his words) that authority is completely done away. That seems to me to be perfectly a ridiculous answer. Here is a manuscript of *Dyer*, written by some clerk for aught one can tell; he might be a clerk, even in those days, not able to read Latin, and therefore he left a blank, to be filled up by somebody more a clerk than he was. Are we, because those words are not found in this manuscript, to suppose that the report of *Dyer*, finished, considered, printed and published, as your lordships will see by the preface, and by the dedication, by his two nephews, is so erroneous? Are we to suppose that all this is a dream and a fancy, merely

merely because the clerk who wrote Treby's manuscript left a blank, because he did not understand Latin?

Lord Kenyon. Did not Sir George Treby himself publish a new edition of Dyer?

Mr. Bearcroft. I cannot answer that question. If he did, it would be an argument *ad hominem*.

The learned serjeant takes notice too of a case in 4 *Inft.* 228, which is the Cambridge case: He is pleased to say (this is for the purpose of shewing that there cannot be a dissolution of a corporation without act of parliament) that the punishment which the corporation of Cambridge received upon that occasion was by act of parliament. I will not tire your lordships with reading the whole of the case.

It states great uproars and tumults, and extremely ill behaviour, on the part of the corporation, to the members of the university, in Richard the second's time. I trust that is not precisely the time to go back to learn corporation law.

A writ issued to call the corporation before parliament: there they proceeded; and when they were brought, they asked three things:—First, a copy of the bill—Then counsel—Then respite to answer: and they received strange answers, which make us not very much in love with the law of that time.

To the request of a copy of the bill, it was answered, that "sithence they heard the same, it should suffice; for by law they ought to have no copy."

To the request of counsel, it was said, that "wherein counsel was to be had, they should have them when they wanted them; but they were appointed to answer to no crime or offence, but only touching their liberties."

Then he goes on to say, that the King, by common consent of parliament, and by authority of the same, seized the said liberties into his hands as forfeited.

Now, my learned friend says, here is to be found in the margin of this book—"Nota, This was by act of parliament." If your lordships will give yourselves the trouble to look at this case, I beg to say, it is very doubtful whether it is not one of those proceedings which were not uncommon in former days, of the parties being called, in the first instance, before the king in parliament, as a court administering the common law. I believe I am right in taking it to be so, because the commencement of the proceeding is expressly stated, in the book I have in my hand, to be by writ, which is not the way of proceeding by a bill, and by act of parliament.

But I am ashamed to take up your lordships' time in this case. What is it? A proceeding in Richard the second's time—a single case: a proceeding—take it so—by act of parliament; but what is it to the purpose for which it was quoted? namely, to prove that a corporation can never be dissolved but by act of parliament, or the natural death of the parties?

There is a case, the *King v. Grey*, which the learned serjeant quoted, 8 *Mod.* 358. I did mean to refer to the book, but I will not take up your lordships' time; I will content myself with these short observations:—In the first place, your lordships will find no determination there—of course there is no judicial opinion which was proceeded upon; besides, the judges differed; added to that, your lordships will find most of them considered that case which was contended to be a surrender of the corporation, or the capacity of being a corporation, as a mere surrender of the deed, and not of the estate. This is the sort of talk in the case of the *King v. Grey*, followed with no determination at all.

I come now, and shall be very short upon it, to a very formidable objection, as the gentlemen seem to think it, as to the mode of proceeding in this information by Sir Robert Sawyer. It is said, it is an absurdity—you blow hot and cold—you say they are not a corporation, and yet you call upon them to answer you by the name of a corporation. My learned friend went so far as to say, that there were no instances of it; and I think I quoted the argument of Treby, in the city of London case, for so saying.

I refer your lordships at once to Sir Robert Sawyer's argument; where you will find a string of references to cases in which they did proceed exactly in that form,
in

in order to dissolve a corporation—proceeded against them by their corporate name. I should think that either way would be perfectly good. To be sure, if there are a few persons who compose it, ten or twenty, you may easily proceed against them in their individual capacities, and say, “You have usurped a capacity of being a corporation—why do you do so and so?” But is it possible, in a case where there are two or three thousand members of a corporation, which your lordships know frequently exist, that, in order to get rid of the corporation, you must find out, serve with, bring into court, and make appear to your process, every one individual that composes it?

But what is the solecism and absurdity the gentlemen fancy they have found out? “You call them a corporation, and they are not a corporation.” Is there any thing new in our law, to make a distinction between the possession and the right? A great deal, to a person who is in possession. But we are at liberty to question the right; it is a distinction made for ever and ever. What then is the objection to question their right to be a corporation by their name? I find you in possession of the corporate character, *non constat*, whether you are rightly so or not; you say you are: I will treat you, for the moment, and for the purposes of the inquiry as being in possession of that character; but I desire to see whether you are not usurpers of that character. Is there any thing improper in that? But if there were, it seems sanctified by numbers of precedents quoted by Sir Robert Sawyer, and by the necessity of the case where there are such a number of corporators as your lordships well know in many instances exist.

It certainly stares the gentlemen in the face who state this position, that a corporation cannot be forfeited—a question which your lordship upon the woolpack put. What! shall it not be forfeited for abuses? It is a tacit condition annexed to every grant which is accompanied with a public trust, that if there is a breach of that trust, if the purpose for which the privilege was granted be not performed, the trustee forfeits his right.

It is a principle in that case of Sir James Smith, which was quoted several times to your lordships, and which you will find in 4 *Mod.* 58. It was there resolved by the court, that a corporation may be dissolved, for it is created on a trust, and if that is broken, it is forfeited. Then it goes on to treat about the judgment of seizure being wrong, and other matters of that kind. It was determined, upon a difference of opinion, as I take it, between the judges, in Sir James Smith's case, that notwithstanding a corporation might be dissolved, yet nevertheless he remained an alderman. Those were favourable times for determining such a case—it was very recently after the revolution.

My lords, I have nearly finished; and I come now to what I conceive the real point upon which the operation of the judgment *quousque* turns. I beg leave to say, that the learned counsel on the other side, both of them, hand in hand as it were, danced round this judgment, and the real question that arose in the case, without ever touching it or stating it. It is not necessary for me to maintain that the effect of the *quousque* judgment was, seizure of those franchises.

Your lordships will take it along with you, that the information is for the franchise of being a corporation. I say, it is not at all necessary that I should maintain that the effect of that seizure *quousque* the court should further order, is an absolute seizure at the moment.

It is stated in all the books upon the subject, that it is *nomine districtonis*; it is for the purpose of compelling the party to appear; it is taking the franchise into the king's hands for the moment, stopping the exercise of it till they come in, as they ought, to answer that inquiry which the king has a right to institute. By what title do you do this? if they come in in time, it will be restored to them; then they will appear, and the question be gone into: but it will not have the effect of being compulsory at all, unless there should be a time, beyond which if they do not appear, they will come too late.

Will

Will your lordships reflect what a gross absurdity it would be to say the king shall proceed against a man to inquire into his title to exercise a franchise of being a corporation; that the king has a right to inquire into it; that the king has a right to seize those franchises, if he don't come: but that it is to be attended with no consequences! It would be attended with no consequences at all, unless, after a certain time, the king might, if he pleased, put other persons in the stead of those so called upon, to exercise that authority, and act as a new corporation. Suppose the parties chuse to continue obstinate; suppose there be no property, or but a trifling property, so that you cannot compel them to come in; is the obstinacy of a few individuals to be attended with this consequence that the king's power to create a corporation, for the purposes of good order and government, in a particular place, should be absolutely defeated by their conduct? It is impossible, in my apprehension, that the law can be so absurd.

Then this judgment *quousque* is for the purpose of compelling the parties to come in, and can have no effect unless there be a certain time within which they may come in, and have a right to replevy. What is that time? Your lordships have Lord Coke's opinion, grounded upon a case in the year-book, and in Jenkins, in which it is said, that in the eyre you must come whilst the eyre is in that county; so in the court of King's-bench, Lord Coke expressly says, you must come either in that term, or at the farthest the next term. When we look into the authorities in the margin, which are two besides this year-book case, there is nothing that says that, in the court of King's-bench, you must come in to replevy next term, or the term after. I don't know that there is, because it speaks of another subject, it speaks of the proceedings in the eyre.

Is the authority of Lord Coke (the oracle of the law, as he is correctly called) slight authority? that such is the course when proceeding in the King's-bench? Have you any authority against it? Have not you a strong reason, which I have suggested, of the necessity that it should be so? Is there any authority on the other side? if there is, I challenge my learned friends to produce it. But in this case they did not come in the next term; the king does not take advantage of that delay immediately; for it is not till a year after that the king makes his election to say, "I will not restore this corporation, but, for the good of the country, will fill it up." He is not bound to restore it; of his grace and favour he may do as he has done in the Malmbsbury case; he may do it at any time: but the king makes his election, and says, "I have a right to keep it, since you have missed your time to come in, and continued contumacious; I have a right, for the sake of the public, to erect a new corporation, in the place vacant by the seizure of the former corporation, and by the loss of it; not *ipso facto* by the judgment, but by the judgment with the subsequent contumacy added to it." That is the way in which I consider the question, and in which I take leave to argue in support of the judgment *quousque*.

I come now to the acceptance of the restoring charter. The gentlemen have argued seriously (which I am really astonished at) that the restoring charter is accepted by us; that is, accepted by the corporation, which has its being under the charter of Charles II! If your lordships would read the words of their allegation of that acceptance, you would see that their averment is, as it must be, the contrary; "which said letters patent, the said mayor and citizens of the said city of Chester afterwards, to wit, on the said 26th day of October, in the said year of our Lord 1688, and in the said fourth year of the reign of his said late Majesty King James II. did accept and agree unto." Your lordships will see, that "the said mayor and citizens" they are talking of, are the mayor and citizens under the charter of Henry VII. that is their allegation. It would be grossly absurd, to suppose that it was an allegation that we accepted it. They will be found to be the mayor and citizens under the charter of Henry VII. that, therefore, falls to the ground, because the observation is not founded in fact.

I have a very few words more to trouble your lordships with.

The

The learned serjeant has referred to a case in *Comberbach*, 307. Your lordships will find nothing in that case, except that the learned serjeant is founded in this observation—that at that time the city did not think proper to set up the charter of Charles II. It is chiefly filled up with a violent scolding and wrangling between Williams and Powell, then at the bar. But what is the observation to us, that at that time the charter of Charles II. was not set up?—for what reason it was not done—who were the advisers of the parties—we cannot tell; we have nothing to do with it: we are not to stand or fall by the acts of persons in former days, but by the words of this record.

Then the reports of Serjeant *Barnardiston* are referred to; which, whenever I have happened to hear quoted, I have observed, have made many people shake their heads: and I remember perfectly well, when the court of King's-bench were laughing at them, Lord Mansfield said, "I am not at all surprized; I remember Serjeant *Barnardiston*, and he was certainly in no very great credit." But the gentlemen are not so fond of him, as not to make him give way to Mr. *Masterman*, the master of the crown office's note. The application was only for leave to file an information; and the doubt of the court was, whether the charter of Charles II. had been accepted? The court permits the information to be filed, in order to try the question of the validity of the charter of Charles II.—nothing was decided upon it. But upon this record the acceptance of this charter is found; I therefore think your lordships will not get much information from that.

My learned friend closed, so shall I, with taking notice of a record of an information in quo warranto by Sir Robert Sawyer, against the corporation of *York*, which was for usurping the franchise of being a corporation, and other liberties; and there was judgment of seizure *quousque* just as it is here: and it was observed that the defendants came in, and that they were restored inasmuch as they appeared. This was in the last year of the reign of James II. just about the time, your lordships recollect, that he took fright, and endeavoured to do away all the mischief arising from these charters. It appears that it was done by the grace and favour of the king; and it manifestly appears that the king was disposed to shew grace and favour at that time; besides, from the history of the times it is apparent, for there is a *non pros* by the attorney-general. Where is the argument by counsel? Where is the decision by judges? Where is the report of any one point of law, considered and adjudged by those judges? There are none such.—Your lordships have a naked record, in which it appears, that afterwards the party asked for restitution, and had it.

The only remaining case is, of a record that has been referred to of *Malmesbury*. That was an information of the same kind. There was a seizure *quousque*, and in the first year of the reign of James II. there was final judgment: he was then courageous upon the subject, and proceeded to final judgment. There was a writ of error—error assigned—in *nullo est erratum* pleaded by the attorney-general. What those errors were, does not appear by the record, or any other document, that any body can have recourse to. There was a reversal; why, does not appear. This was in the reign of William and Mary, immediately after the revolution: and I can account for that by another observation:—Sir George Treby was the attorney-general at that time; it is extremely probable he assisted in that way, and thought it a good way of getting rid of it, by not supporting his plea in *nullo est erratum*. The times were altered: your lordships will find that the lawyer who argued against the crown lawyers, in the quo warranto against the city of London, was then a crown lawyer.

In this way I have gone through, I think, the whole of the case; and I humbly contend before your lordships, that thus it stands:—that our plea is good—that it is not hurt by the introduction of that reservation in the charter—for that it has a legal intent: if it is illegal, it is void, but it don't destroy the charter with it. I shall not repeat what I said this moment, about the effect of the *quousque* judgment: and I say, that, as to every thing of their argument to attack our charter, which is

built upon the charter of Henry VII. it falls to the ground, inasmuch as that grant was void, for not being under the great seal of England.

I will not take up any more of your lordships' time.

February the 19th, 1790.

Mr. B O W E R.

I Have the honour to attend your lordships likewise, as counsel for the defendant, in error, upon this record; and, my lords, as I am afraid it will be necessary for me to trespass a good deal upon your lordships' time, I shall not waste it by any unnecessary preface; conceiving that I cannot conciliate your lordships' attention, or recommend myself to your indulgence, better than by entering immediately upon the duty incumbent upon me—the discussion of this record.

Before I enter upon the arguments which have been urged by the council for the relator, I think it my duty to pay much attention to an objection which, it seems, has suggested itself to the mind of one of your lordships, and which was condescendingly intimated to the counsel for the defendant in error, for their consideration, before they came to be heard for their client.

I understand the objection was, that it did not appear from any thing stated upon the plea, that the common-council, out of which the aldermen were to be elected, was ever originally created, or the corporation ever put in motion (I presume I did not misunderstand the learned lord) that if it could be inferred, that the common-council was *originally* created, or the corporation put in motion at first, so as to be continued from that time to this; and that there is nothing upon the record but what was referable to the title the defendant set up, his lordship thought it must, in the situation in which this record stands now, be taken as a fact clearly proved at the trial—that it must be taken to be so after verdict; but it seemed that his lordship thought, that unless a common council was created, and the corporation was originally put in motion, that nothing could be inferred to suppose the *continuance* of that corporation; and upon that ground his lordship thought the plea defective as it stood.

If I am right in my idea of the noble lord's objection, I beg the attention of the house to what the relator states at the outset—what is stated upon the defendant's plea—and what the jury must have found; for if we have occasion to take advantage of the statutes of Jeofails, they are extended to all proceedings in the nature of quo warranto, by the statute of the 9 *Ann*, cap. 20; and that statute, in truth, puts matters of this kind into the situation in which they ought to be; namely, in the situation of civil actions, trying the civil rights of the parties.

Your lordships will observe, that the plaintiff in error sets out with stating, “ that the mayor and citizens of the city of Chester have been, now are, and for the space of ten years now last past have been, and long before were, a body corporate and politic, in deed, fact, and name, by the name of mayor and citizens of the city of Chester; that is to say, at the city of Chester aforesaid, in the county of the same city; and the said coroner and attorney of our said present sovereign lord the King, for our said present lord the King, gives the court here further to understand and be informed, that for and during the whole time aforesaid, there have been divers, to wit, twenty-four aldermen within and for the said city of Chester.”

He himself, therefore, avers to your lordships, at the outset of his record, that there are now, and for an indefinite time have been, a mayor and citizens of the city of Chester. He then goes on and states, “ that during all the time aforesaid, there have been, and still are, twenty-four aldermen of that city;” and the only question which he states upon the record, as a matter admitting of any doubt, is, whether or no the defendant is properly qualified to exercise the office of alderman of that corporation; which he states to have existed for an indefinite time, and to be still in existence:

I beg

I beg your lordships to understand, that I shall now confine myself merely to the information—the plea—and the issue taken upon it—not entering at present upon either of the replications put upon this record, till I have disposed of the preliminary objection started at the outset of the case:—The defendant, by his plea, states, that true it is, “that the city of Chester is an antient city, and that the mayor and citizens of the said city, now are, and for the space of ten years now last past have been, and long before were, a body corporate and politic, in deed, fact, and name, by the name of the mayor and citizens of the city of Chester.” And then he proceeds to state the charter of Charles II. under which he is by and by to derive title, and by which it will appear to your lordships that a corporation was intended to be created by the King, which should have perpetuity; for all the provisions of the charter, in every part of it, go to shew that it was the King’s intent that the corporation should have perpetuity; I don’t mean to say that corporations may not be created upon trusts, which are to determine; but the defendant having stated, that he being a citizen, and one of the common-council of the city of Chester, was, at a certain time, “by the major part of the then mayor, aldermen, and common-council, of the city, then and there, in the Common-hall of the city, in due manner assembled and met together, lawfully and in due manner elected and made one of the aldermen of the said city;” there is issue taken upon that fact, and the jury have found (which is material for your lordships to consider here) that in fact, he being a common-council-man, was elected an alderman of the city of Chester, in manner and form as he has alledged.

I take it to be a matter which admits of no doubt, that any material fact which is averred, and which the jury have found to be as the party pleading it has stated, and which necessarily imports a fact without which the jury could not have found that verdict, is after verdict to be intended, and that we have no occasion to resort to any statute to protect us upon this occasion.

It certainly is a principle too, that an averment is not necessarily made in any precise form of words; there are a vast many informal averments which have been held to be sufficient, notwithstanding you cannot find upon the record any precise terms which, strictly speaking, shall be considered as an averment; I don’t mean to trouble the house with many authorities upon this subject; I mean only to express myself intelligibly, and give one or two examples of what I am aiming at.

The case from which I take this short note is in *Lutwyche*, 1172, *Hill v. Bolton*; where it was held, that any words which imply such a matter to be so, are a sufficient averment; as if it be pleaded, that A. was seized and died, and the land descended to B. as his son and heir; this is a sufficient averment that he died seized, for otherwise it could not descend to B. as his heir.

I will shortly state a few of those authorities which seem the strongest for my argument, only to shew the variety of matters which have been held cured by verdict; and that almost every kind of defect which does not amount to shewing, that the title itself was bad, is cured after an issue taken upon a fact, which must necessarily imply that to be proved.

My learned friend before me stated one case or two to this effect. I trust I shall receive your lordships’ indulgence, if I should refer to a case or two cited before, because I cannot make myself intelligible without now and then referring to those cases your lordships have before heard.

In an action of assumpsit, the consideration was stated in this manner, “Whereas the defendant had sold to the plaintiff all the fuzes to be taken before such a day—the defendant, in consideration of the premises, undertook he should not be disturbed in carrying them away.” Undoubtedly, in point of form, it should have been averred that he was disturbed before the time expired which he had to take them away; this defect was held to be cured after verdict. *Croke, Charles*, 497.

The next case goes exactly to the same effect. Upon an action for debt, for rent, no attornment was alledged, which before the statute taking it away, was absolutely

solutely necessary, or the grant could not be good. It was held after verdict to be good. *Sir Thomas Jones*, 232.

The next is an anonymous case, in *1 Modern*, 169, on a promise by an executor to pay 5*s.* when he received money; averment, he received money, without saying 5*s.* good after verdict (and I cite this case to shew the distinction that has been taken) though bad on demurrer. There is a difference, your lordships see, between even a general demurrer and a verdict, in a matter where a defect is to be cured.

The next is still stronger, for it omits a most material allegation, and without which the action could not be supported; it is in *Caribew*, 7. That was an action for not bringing certain barrels of raisins to be weighed at the common beam. The declaration alleged the custom to be to bring goods to be sold by weight to the beam; and it did not aver that these were a kind of goods usually sold by weight, or that the defendant had not paid the toll for weighing; that was held good after verdict.

And so in a debt for rent for three years, on a demise for a year, and so from year to year, without saying that the defendant continued in possession for three years, without which your lordships see he could have had no action—held good after verdict. *1 Siderfin*, 423.

Perhaps these cases would be sufficient to establish the position which I have had the honour to contend for before your lordships. There are many others in *Siderfin*, page 13 and 15; in the first of which your lordships will see that the want of alleging a tender and refusal is cured by verdict.

In an action for a malicious prosecution, it was not stated, that the plaintiff was acquitted, or what became of the prosecution; it being found, by verdict, that the defendant maliciously indicted the plaintiff. Mr. Justice Twisden, who gave the opinion of the court, there said, that clearly that was good after verdict. "It seems," says he, "it would have been otherwise in demurrer." These are cases which are all pretty strong.

But I will now state, that in trespasss, where a title is stated, prescription alleged, and the party does not make out his prescription after verdict, even this matter shall be intended, though he does not state the prescription as the foundation of his title. In *Croke James*, 44. the defendant justifies, for that he had common for all his beasts, *levant* and *couchant*, in the place, &c. by prescription; and that he put in the said cattle *utendo communia*, &c. The issue was upon the prescription, and found for the defendant; and exception was now taken because he does not aver that his cattle were *levant* and *couchant*, that no judgment ought to be given; *sed non allocatur*, for the want of averment is aided by the statute of Jeofailes—wherefore it was adjudged for the defendant.

In another case, in *Croke Elizabeth*, 458, after verdict it was held to be cured, though the defendant had stated his title to be for cattle, *levant* and *couchant*, between a certain time and another certain time; and when the lands could not be sown, and he admitted to aver even that he put his cattle in between those days, or that the lands were not sown; therefore undoubtedly he failed in almost every part under the averment of that prescription; yet the court were of opinion that it was aided by the statutes of Jeofailes, and accordingly judgment was pronounced for the defendant.

Trespasss for the taking beasts, namely, four cows, and chasing and impounding them without cause: The defendant justifies, as in his freehold, for *damage feasant*; the plaintiff, by replication, shews, that he is, and time whereof, &c. was seized of a messuage, and twenty acres of land, in D. and that he and all those whose estate he had then had from time immemorial, common for all his beasts, *levant* and *couchant*, upon the said tenements, &c. in the place, in which every year after, the sown corn was severed and carried away until it were re-sown; and that he there, after the corn was severed and carried away, put in his said beasts into the place where, &c. *utendo communia sua prædicta*, &c.

The issue was taken upon the prescription, and found for the plaintiff; and it

was now moved, in arrest of judgment, that the replication was not good, and so the plaintiff ought not to have judgment, because he saith that he put in his cattle after the corn was severed and carried away; but saith not, that it was before the land was re-sown, for otherwise he had no title to common. Secondly, Because he does not aver that those cattle were *levant* and *couchant*, upon the land aforesaid, for otherwise he cannot use common with them, nor hath he sufficiently entitled himself to put them in, and in proof thereof vouched—10 *Edward III.* 56, and the precedents in the book of entries, *Tressass in Common*, 9 and 11.

But all the justices held that in regard issue is taken upon the prescription, although peradventure the plea is ill, and ought to be adjudged against the plaintiff if he had demurred thereupon, for this cause; yet it now shall be taken to be good enough, and to be holpen by intendment, when it is said that he put them *in utendo communia sua predicta*, that it was at such a time as the common is to be used, and with such beasts as are there to use the common; wherefore, without any great argument, because “it was after verdict, and might be well intended, and so aided by the statutes of Jeofailes, it was adjudged for the plaintiff.” This is in *Croke, Elizabeth*, 458—*Corbyson v. Pearson*.

There is but one more case I mean to trouble your lordships with upon this grount which is reported 1 *Siderfin* 218; and it goes to shew, that a defect, of the kinder rich we want to be aided, should be aided, and not only so but even that a presumption should be made against the case, which seems to be *prima facie* the case made by the party.

This case was cited by Lord Hardwicke, in giving the judgment in the *King v. the Bishop of Llandaff*, in 2 *Strange* 1006 to 12. In that case an exception was taken in an action of *quare impedit*, brought by the crown, that no presentation was alledged by the crown, which was a material defect. All the court held, that there it was material to alledge it, and the want of so doing would be bad upon demurrer, yet it is now cured by the verdict; and lord Hardwicke cites *Lord Hale*, 1 *Ventris* 122, and he says, that the court will intend any thing to make it good according to *Hale*; “but here,” says he, “there needs no intendment, for it was of necessity to have been proved.”

Then to apply the cases I have been stating to that now before your lordships—it is at most but an informal averment: when I state that A. was one of the common-council, and elected out of that common-council to another office, it is only an informal way of averring, that there was a common-council. The averment includes two propositions in itself; namely, that there was a common-council, and that he was one of that common-council—it was utterly impossible that he could be one of the common-council of the city of Chester, if a common-council did not exist.

Then we shall get this length, that it is only an informal averment of two facts: First, That a common-council was subsisting at that time. Secondly, That he was one of that common-council so subsisting. Then when the jury have found these two facts, they have found, undoubtedly, the existence in fact of a common-council; and if there is no title to which the existence of that common-council can be referable but that charter which is set up by the defendant, as the ground-work of it, and to which he refers his title; then from the finding of the verdict, abstracted from the special replications, it must be inferred, that a common-council, was existing, if, in point of law, a common-council, not named by the King, could be good, though the King did not specify who should be the first of them, and set them in motion; for it is clear, that if the King granted a power to A. and B. to be a corporation, and they accepted that charter, if they did not proceed immediately, according to the terms of the King's grant, to elect, the court of King's-bench would compel them, and the right of election necessarily devolves upon that body which was to be made perpetual, and who were directed by the King's charter, to fill up certain offices.

I don't chuse to stir a step upon this head without an authority to bear me out: there cannot, I think, be a doubt but that the King can grant such a corporation, without naming the first officers under the charter, but if any doubt can remain upon

upon that subject in your lordship's minds, I will cite two instances, which are as good as an hundred.

In the College of Physicians' case, in 3 *Salkeld* 102, it was held by Holt, chief justice, that when Lord *Coke* says, a corporation must have a corporate name, it must be understood either as expressed in the patent or implied in the nature of the thing, as if the King should incorporate the inhabitants of Dale, and give them power to chuse a mayor in this case, though there is no name of incorporation in the patent, yet it would be a good incorporation, and the name would be a mayor and commonalty.

The King, it appears in 10 *Coke* 33, and 1 *Rolle* 512, may give power to a common person, to name the persons, as well as the name of a corporation; and when he has done that, this corporation is not said to be made by a common person, but by the King.

In the present case, the King has granted a charter of incorporation to the mayor and citizens of Chester, which appears upon this record to have been accepted by them; it appears, that in that charter the King had declared that there should forever after be a common-council in the city of Chester; his Majesty not having named those persons who should first take upon them this office, the right ^{ve} the duty of electing necessarily devolved upon the majority of that body who ^{sa} so accepted of the King's grant, and by consequence of it, became incorporated, and it was their bounden duty to proceed, without delay, to the filling up the vacant offices.

If I have got the length of shewing, that after a verdict upon the fact of the existing of a common-council—and it being a part of the duty of the corporation to preserve its continuance, by election—and that the King had a right to create it in that shape, unless contrary to the rule of presumption, that every thing is supposed to be done right instead of wrong; it must be taken that they did elect a common-council; and as their existence can only be referred to by referring to that title, your lordships must take it, that these persons have been elected, and that there have been from that time to this, mayor and citizens of Chester. And there is no pleading which carries these averments further, or shews the manner of the existence of the corporation from its commencement, at the time when it becomes necessary first to inquire about it.

I have endeavoured to answer a doubt suggested by a noble and learned lord at the outset, not only because of the respect due to the noble and learned lord which made it necessary for me to apply myself to solve any doubt that might come across his mind, but because it was necessary to the title of the defendant, who, I admit, must stand upon his plea. If, after verdict, it must be intended that this was a corporation in fact, and there was no title to be referred to but that which is set up, I go to a conclusion at once, that that is necessarily good, unless it has been avoided by the matter in the special replications, which I now proceed to examine:

The first special replication introduces fresh matter appearing upon the face of this charter; and it is contended, that some matter is introduced by what is disclosed upon that replication, which shews, that this corporation of the city of Chester, could not exist under the charter of Charles II. inasmuch as a power to remove all the members of the corporation is reserved by the King, which is alledged to be illegal; and it is then contended, that if that clause in the letters patent is illegal, the whole of the letters patent fall to the ground, and, of course, that the defendant can make no title under them.

I totally deny that there is any such power reserved by the charter, and I shall trouble your lordships by and by with the reasons why I so deny it. But I will admit, for the sake of argument, for a moment, that the power of amotion, reserved by this charter, is a power to remove all the members; I will then contend, that the consequence by no means follows (even admitting, as I will do in that case, that the power of amotion, so reserved, is illegal) that that illegal clause vitiates the whole of this charter, and that it must all fall because that clause in it is illegal.

I have

I have examined, with as much industry as I could, the several cases which have been cited in support of the opinion, that if that one clause is illegal, the whole of the charter must be so too. The cases that were cited in support of this objection were, I think, only four (if there were more they have escaped my notice) I have looked at them, and think I can safely say, that none of them come up to the purpose for which they were produced.

I believe your lordships will find, in all the cases that I am to cite—and where it is supposed that the King is so deceived in his grant, by the introduction of one improper clause, as that the whole grant is void, that they are either cases where the King supposes he has a different title than what he has—where the grant cannot take effect—or where he is deceived in what he grants.

The first case which was cited, was, the case of *Alton Woods*, 1 *Coke* 46. The case of *Alton Woods* is mistaken, because it only proves, that the King was granting such an estate as could not take effect; and in the very page of the report where this case is cited from, the rule is laid down, and it is illustrated by this example—that if the King grants to one, and his heirs male, it is void because the King cannot grant to the effect he intended, therefore the grant is void.

The next case is from *Hobart*, 223. That still less makes out the position which it is intended to support; for there the consideration of the King's grant was a surrender of an estate, by husband and wife, and the deed, as to the wife, was void; so that if the wife had come into possession of that estate, the King could not have had the benefit, which was the consideration of his grant; and, therefore, he was deceived in the very substance of his grant, which I admit would undoubtedly make it void.

In the case cited from *Vaughan* 14. of *Tusnel v. Campbell*, there was a mistake in the King's title:—That was a case where there was a presentation by lapse, and it appeared the King had no title by lapse. The case referred to was where the Queen had presented, in right of her crown, where the title was by lapse, and it was held void; but for this reason—that the Queen's presentation made no usurpation, because she presented as supposing she had a title, in right of her crown, as appeared by the form of her presentation; which is very remarkable, and therefore her presentation was merely void, for it shall not be intended that the Queen took away another's right against her own will and declared intention; “that is a good reason why that should be void; because the effect of it is different from what the Queen intended.”

Moore 45, was the case of a grant of an estate the King had by the attainder of Sir Thomas Wyatt.

There must be a mistake in citing it as an authority against us, for it appears that *Brown and Weston* against *Dyer*, held the grant good.

Now there are several rules laid down which shew what cases shall avoid the King's grant, and upon what deception (if there was a deceit in fact) or if the condition of the grant was contrary to what the King supposed; no matter, for a moment, whether suggested on the part of the grantee, or suggested by the King—I will admit, for this part of the argument, that it would be void; and that I may give your lordships the ideas of other people, which are better than my own, and expressed in much better language, I will trouble your lordships to attend to these rules, which are all collected together in 4 *Bacon's Abridgment*, 210. The authorities cited, state those cases where the King's grant shall be void, because he is deceived, and where it shall not, because he is not deceived.

The first rule is, that in the construction of letters patent, every false recital, in a part material, will not vitiate the grant, if the King's intent sufficiently appears. The instance that is put, is, that it was so held in the case of the *King v. the Bishop of Chester*, where the grant was made to a person as a knight, who, in truth, was no knight; and though the grant was held void for this reason, in B. R. yet the judgment was reversed in parliament.

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The second rule is, that if the King is not deceived by the false suggestions of the party, but only mistaken by his own surmises, this will not vitiate his grant; and so was the resolution in the case that was cited of the *King v. Kemp*.

The third rule is, that though the King mistakes either in matter of law or fact, yet if this is not any part of the consideration of the grant, it will not vitiate it; and so is Lord *Chandos's* case, which was thus—Henry VII. granted to Lord *Chandos* a manor in tail; and the same King, by other letters patent, reciting the former grant, and *that*, in consideration thereof, to be cancelled—that he was and is seised in fee—did grant the said manor to husband and wife, and to the heirs of the husband, &c. Now, though by the surrender of the first letters patent, the estate tail was not determined, and so the King not seised of the manor in fee, as he cited, he *was* in the second grant; for he had only a reversion in fee expectant upon the determination of the estate tail; yet the clause, namely, “by virtue whereof we are seised in fee,” being what the King collected to be the consequence of the surrender, and not at all owing to the misinformation of the party, either as to the intail or surrender, the mistake which he made, being no part of the consideration, the grant was held good.

I have argued thus, taking it that there is no difference in cases where the King recites *ex certa scientia et mero motu*; but undoubtedly there is a distinction, and which has been acquiesced in, and which has been laid down, by almost all the authorities in which this sort of question has come to be discussed.

Fourthly, That the words *ex certa scientia et mero motu* in the King's charters and letters patent, do occasion them to be taken in the most benign and liberal sense, according to the intent of the King expressed in his grant.

Fifthly, Though in some cases the general words of a grant may be qualified by the recital, yet if the King's intent is plainly expressed in the granting part, it shall enure according to *that*, and is not to be restrained by the recital.

Lord *Coke*, in 2 *Inst.* 496, gives this as an excellent rule for the construction of the King's letters patent, not only of liberties, but of lands, tenements, and other things, which he may lawfully grant, that they have no strict or narrow interpretation for the overthrowing of them, *sed secundum earundem plenitudinem judicentur*; that is, to have a liberal and favourable construction, for the making of them available in law, *usque ad plenitudinem*, for the honour of the King; and he cites this, *Rep.* 45, 10.

In the case before your lordships, the grant is *ex certa scientia et mero motu*—there is no suggestion on the part of the grantee—it is a grant moving from the King, as far as appears upon this record (and I shall have abundant reason to beg your lordships not to suffer any arguments that don't relate to it to have any weight) nothing appears upon this record to shew, that there is any petition even from the party to whom the grant was made, and nothing shewing, but that it was a clear grant, of the bounty of the King; it is a charter, of all others to be construed liberally, and that its intent may be carried into effect; for it is a charter made for the single purposes of government, without any benefit being derived (as far as appears upon this record, and as far as your lordships therefore can take notice of it) to the grantees.

There is, therefore, not a case to be stated, in which every one of those rules of construction, to be adopted in construing the King's grant, do not hold the strongest way in favour of this charter, even upon supposition that that clause which I stated to be void, should be held to be so, and not to have effect—the King is not deceived in his grant; he knows what he intends to grant; but, in a separate part, he has attached a provision which is void in law, and which he cannot have the effect of, and which, if your lordships say shall have an effect, you must say he intended to do an act merely nugatory, by putting a clause into that grant which must necessarily prevent its having any effect, and destroy all he was about to do. That is a rule not supported by any one of the principles upon which the King's grants have been avoided; that is a case, not at all analogous to those which have been stated.

stated, where the King's grant has been avoided for a defect in part of it. I trust your lordships, looking only to this record, and looking at the authorities, will find no reason to say, that it is void; that the King was deceived in his grant, to his prejudice, because there is a subsequent clause introduced which cannot have its effect.

I have considered it so far upon a supposition that the King *was deceived* in his grant, and that the power of amotion was a power of amoving *all*; but I contend there is no such power reserved in the charter. It is a rule in construing every instrument, that which comes from the King, and that which is made by the subject—that the whole shall be taken together, and the intent of the grantor shall be taken from the provisions of the deed.

Your lordships are to say, from the whole of this grant, what was the King's intent—was it his intent that the corporation should be immediately dissolved? On the contrary, does it not appear manifest that the power of amoval meant to be reserved, was a power to amove only so many as should leave a sufficient number to fill up the vacancies that should be occasioned by such amoval; for in the very next clause after that power of amotion is reserved, the King expressly says, that the vacancies shall be filled up by the majority of the residue of mayor, aldermen, and common-council; and he prescribes the mode too in which this majority shall proceed to fill up the vacancies; taking the whole grant, therefore, it is impossible to suppose that the King meant to reserve a power of amotion of *all*, when, by the very next provision, he states, how these vacancies shall be supplied.

But it is said, that by the words of the charter, taking them grammatically, that power *is* reserved; I submit, that even upon the grammatical construction, there is no such power of amotion reserved. The King reserved authority to himself, his heirs, and successors, to amove, &c. and all or any of *them* so amoved, and declared to be amoved, from their respective offices, should, in deed and in fact, and without any further process, &c.

In strict grammatical construction, *them* must refer to the antecedent, namely, the mayor, the aldermen, and one or more of those officers who are mentioned; surely if the King had meant to have reserved a power of amoving *all*, it would have been as easy to have expressed it in that language; and the language would have been as familiar, that he reserved a power of amoving *all*, as to say he reserved a power of amoving any one or more.

Therefore, when we consider the whole of the grant, taken together, it is manifest the King never thought of reserving a power of amotion of the whole; that he has not, even in point of language, so reserved it, and that the power of amotion which he has so reserved, was such as I am about to prove he well might in law reserve.

In this part of the case, my learned friends were disposed to go into a wide field of argument; and to call your lordships' attention to the consideration of certain constitutional questions which they glanced at; and they hinted that the power the King reserved here might be void, as turning upon *that*; and that the King had reserved a power in this case, dangerous to the constitution, and such as would be illegal.

When that question comes to be discussed, whether the King has the power of amoving persons entrusted with that great franchise, perhaps I shall not have much difference with my learned friends; at least, if it was my duty to argue here, I should humbly doubt such power, with all the modesty and decency the subject requires, and all that guarded expression, consistent with freedom of discussion; but your lordships are relieved from any such question here—your lordships must look upon this record—you will not step out of it—there is not an allusion in any part of this record, to the power of electing members to parliament, and from which your lordships can by possibility collect, that the mayor, aldermen, and common-council of Chester, are entrusted with that franchise; we are not to travel abroad and to debate constitutional questions, merely for the sake of discussing them—if

there is not something stated from which your lordships must take judicial notice, and see that that power is trenched upon.

Then there is nothing left but either that ground upon which the learned serjeant put it, that the King could not reserve a power of amotion, because an alderman was a constituent part of the corporation, and had a freehold in his office; or the other ground Mr. Erskine thought it necessary to resort to—the manifesto of the Prince of Orange, stating, that because King James had garbled corporations—had removed the existing members of corporations, and had put others in their room—therefore he was come over to this country. It was well observed by my learned friend on my left hand, that the manifestoes of princes are not the places to which one should go to look for legal authority; and with all the reverence which I have for the revolution—which is as great as my learned friend wished me to have—and feeling the blessings we enjoy under it with as warm a gratitude as he can, he will excuse me when I say, that in arguing the question of law upon this record, I would rather find myself supported by authorities drawn from law-books, and legal decisions, than by any thing collected from the Prince of Orange's manifesto, when he landed, or from all he published altogether.

It must appear, that there is something in the nature of the aldermen of a corporation, abstracted from any idea of being concerned in the election of members of parliament, before your lordships can say, that there is any thing illegal in the power the King has reserved of amotion, provided he has only reserved the power of amoving particular corporators. Mr. Serjeant Adair said, it appeared from a case in *Coke*, that a custom returned of a power of amoving an alderman was void, because he had a freehold in his office.

The answer to that is obvious; the case must either be relating to some corporation where aldermen were elected for life, or else something in the nature of the office itself, which constitutes the holder of it the possessor for life; and it would be a singular argument in the mouth of my learned friends, if they were to contend, that the office of alderman of a corporation is, in its nature, necessarily a freehold; for by the charter which they set up, and claim a right under, not only the mayor, but all the aldermen, and every individual officer of the corporation, from beginning to end, are declared to be only annual. But that case would prove nothing more than this, giving it the utmost authority it can be entitled to, that there are certain offices the King can make, but which he cannot delegate; they are prerogatives inherent in his person, but there is nothing in the nature of even the highest judicial office in the kingdom which makes it not removable at will. In point of fact, the highest legal officer in the country is removable at will, and granted without any patent, and, till the late act, all the judges were equally removable at pleasure. There is no doubt the King might reserve a power of exercising that great branch of prerogative, if he chose to do so, but there is a doubt that he cannot delegate those great prerogatives.

The whole of that case only proves, that the King cannot grant a prerogative which is personal to himself; but if it appears neither from the nature of the office, nor the express words of the grant, that that officer is necessarily in for life, then if there was any thing in this manifesto which we have heard of, which related to this subject at all, it would only prove, that his serene highness, who published this, was mistaken; that so far from that being the cause of the revolution, it was not a cause of even a proper complaint.

The answer I have before given, is that which I must rely upon—that nothing appears upon this record, of which your lordships can take judicial notice, that the franchise of returning members is at all connected with the office in question, or that any one liberty of the subject is trenched upon by the prerogative reserved, as a condition of the grant of amoving any one of the officers of the corporation.

I thought, when my learned friends both came to this attack, that they would have made a much greater impression than I myself feel they have made upon us.

My learned friends have cited the 34th and 35th of *Henry VIII. cap. 34, sec. 1.*, the act for making knights and burgeses of the city of Chester; and we are told that there is something in that act, of which your lordships are bound to take judicial notice, and that it appears that two citizens were to be elected to parliament for the city of Chester. I conceive my learned friends have not advanced one step in their argument, unless they prove that those citizens should elect;—the act only directs that two citizens are to be returned to parliament as burgeses for the city of Chester—it does not follow that those persons who are to be returned, are to be elected by these persons; therefore, conceding that it does appear, and that your lordships must judicially take notice from this act, that there are two burgeses sent to parliament from Chester; I submit to your lordships, that it not appearing these corporators were concerned in that election, the argument is not advanced one step further.

But we are told, that there are other matters of which your lordships are to take judicial notice; and which, if the argument of my learned friends were to hold in the fullest extent, might, perhaps, bring the matter something nearer to the point they aim at; namely, that by an act of parliament, it is declared, that the last resolution of the House of Commons (I take this likewise from the paper they threw in) touching the right of election, shall be final—that your lordships are bound to take notice of *that* act—and then that your lordships are bound to take notice of the resolution of the House of Commons, and that you are judicially to say, upon reading their journals or their reports, what the right of election is, and what the privileges are in matters where election is concerned.

It is a singular argument, that when an act of parliament is made so late as the year 1729, by which, for the first time, it is enacted, that these resolutions of the House of Commons shall have any effect at all in declaring the right of election—that act is to relate back to the time of the charter of Charles II. and that it should make that void which before, from any thing that appears here upon this record, might undoubtedly be good; for the act of parliament only says, that the last resolution of the House of Commons, touching the right of election, shall be final; even if your lordships were to look at the resolution, I desire you will be pleased to see the terms in which it is made, and whether any thing can be collected from it to the purpose for which it is adduced.

It appears, that in the year 1747, a resolution of the House of Commons was made, which declared—What?—that then the right of electing citizens to parliament, for Chester, was in the citizens at large—of which the mayor and aldermen, I admit, are a part, taking it for a moment, as if that resolution was to be received, which I utterly deny; but taking it so, does it appear, even by that resolution, that the right of election of members to parliament, in Chester, is by the mayor, aldermen, and common-council? and if it is not, the anuol does not affect their right of election, which they would have, as citizens, though they did not fill any of those offices.

It appears, they read the original charter of Henry VII.—the letters patent of Elizabeth—an act of the 35th Henry VIII.—several books of orders, of the contents of which we know nothing—that parole evidence was also received—and that upon the whole of this evidence taken together, the House of Commons then resolved, that the right of electing citizens to parliament, for Chester, was in the mayor, aldermen, and common-council, of the said city, &c. So that your lordships are to suppose this charter of Charles II. illegal, as containing a void grant in itself, and making the whole void, which it does not even if I admit it to be void, upon a resolution, in consequence of an act passed fifty years afterwards, and without its appearing even by the document, such as is produced here, what the ground of the resolutions were—what they had been before that day—or what they had ever been from the first existence of the borough.

Admitting it should be received (which I utterly deny it ought to be) it does not bear upon the point in question. I think, therefore, that nothing will appear either

in this act of parliament, or in the extracts from the journals of the House of Commons, which could warrant my learned friend (Mr. Erskine) in the assertion of those rights which he seemed disposed to assert, because there is nothing in them which changes the case from what appears upon the charter itself, or in any way affects the right in granting the charter, even supposing every thing is admitted; and I must own, that when the united abilities of my two learned friends were to make an attack upon this occasion, I did expect them to have been more formidable than I find them—I well know both their abilities—it is my lot, in the course of my life, to be engaged in perpetual warfare with each of them. When I go out of town, my learned friend on my right hand is my perpetual opponent (almost universally)—I come to town, and am dragged into an unequal contest, almost every day, with my other learned friend, and have frequent opportunities of admiring the astonishing force, as well as versatility of his genius; I see and observe every day, with wonder, the vigorous impetuosity of his attacks. When I saw these two learned gentlemen together—men whom I find myself unequal to resist separately, I own I should not have ventured to stand at all, but have sought my safety in flight, if I had not found myself intrenched within the forms of this record, as upon a rock, in itself unassailable, and which I know is not open to attack, because it encircles me in a fortress, which I think can never be invaded; because I steer clear of every one of those objections which my learned friends have made, and neither defiance nor provocation, nor insult nor stratagem, shall draw me from within the lines of this record; I will not accept the challenge of my learned friends, to descend into the plain, and fight there upon equal terms—theirs be the blaze of gallantry, let prudence and caution be mine; and feeling myself here encircled as I do—feeling myself sure of your lordships' judgment, I cannot travel out of this record, to debate questions which do not, upon the face of the record, appear to be brought before you; I say (and conclude the observations I have to make upon this part of the case) that it neither appears from this statute, from the documents, from the resolution of the House of Commons, from the record, or from any one circumstance, whether judicial or not, that the right of election is at all affected by any thing which should be determined by its officers; and that, therefore, a right of amotion, supposing it partially reserved, is a power well reserved, supposing there is nothing in the nature of the office of alderman which creates it a freehold, and which makes a repugnance in the King's option, to remove a man from it who was once in possession.

Mr. Serjeant Adair cited many authorities upon that part of the case—that the King could not do an act against law—that he could not make a new-fashioned estate, &c. I admit them all, and an hundred more such cases, if cited. They beg the question, when they state, that an alderman is an office which, when a man is once in possession, he is in possession of for life—and they disprove that, when by the charter they set up, all the elections are annual; but feeling, as I am sure I do, that there is nothing here which can make your lordships take judicial notice of these questions they want to raise, they have recourse to a most extraordinary assertion—they say it appears here, that in point of fact it is averred upon the record, that they all *have been removed*; and, therefore, without inquiring into the legality or illegality of that power of amotion, which is reserved, it comes to the same thing here, because the corporation *were* removed from their offices, and it must have been dissolved by length of time before this, by the individual deaths of all its members. If I know any thing of averments, there is nothing like it—the averment in fact, which Mr. Erskine admits should be there, he says he does not know how to state, unless it is here stated—he told your lordships where he had got his information upon this part of legal knowledge, and I am sure if he had gone to that fountain from which he drew it, there is no difficulty in stating what should be the form of an averment of amoval in fact; and if my learned friend's abilities had not conducted him up to the height which he has attained in the profession, by a much less laborious way than even attending to the formation of records, he would have

have found no difficulty in stating it—if he had asked me how I would have stated it, I would have added, “and thereupon the coroner and attorney of our lord the King further says, that they thereupon desisted from any further taking upon themselves and executing the office of mayor, aldermen, and commonalty;” there is an averment in fact, that they desisted from the execution of those offices, and that is the only averment by which a fact, upon the record, can be established.

To say that this inference upon the record, is an averment of a fact, confounds all distinction; for there is nothing so clear as a distinction between that inference which the party infers in law, and that plain averment of a fact, which wants no preceding matter, and which depends upon itself and its own substance; which is introduced by an immediate averment of the fact which it means to state.

There is in truth no averment in point of fact, that there was any amotion of its members; and if it appears to your lordships, that in point of law the averment that is made, namely, that they were in fact amoved, is false, no averments will help them for though a want of averment may be helped, and though a defective averment should be helped by intendment, yet no averment of a fact which appears upon the face of the proceedings to be repugnant, false, or illegal, can help the party relying upon such averment; therefore, the power of amotion not being such as authorized the act that James II. did, and the amoval being stated here as a mere inference from his having signified his pleasure, that they should be amoved, nothing follows here to prove that they were in fact amoved.

I don't know that I have omitted any thing of the arguments which were adduced by my learned friends to impeach the charter, from the matter introduced in opposition to it, upon the first special replication. I trust I have made it appear that the power of amotion is in fact partial—that such power is good for the reasons before given;—but it brings to my mind a case the learned serjeant cited to shew, that in a new corporation the grantees must either take the whole charter (and, therefore, take it with the defects existing in it) or refuse it entirely; and that there is a difference between an acceptance by an old corporation and a new one; he cited no authority for that decision, but a *dictum*, not fully considered, by a very learned judge, for whom we all have a very great respect, who threw that out in the course of a very long cause; I mean, the *King v. the university of Cambridge*—I submit, that the position supposed to be laid down by that very learned and respectable judge, that an existing corporation might accept a charter in part and reject it in part, is not law.

If then we have gone through this part of the objections which are raised from the first special replication—and if it appears to your lordships, that in this stage of the record, all objections to the defendant's plea are taken away, and that there is nothing to avoid it except a matter suggested in the next special replication; I shall now apply myself to the arguments adduced in support of the second replication; and if your lordships should be of opinion (which I trust you will not) that you can take that second replication into consideration, I submit that it is full of errors, and that every part of it upon which our adversaries rely, is capable of receiving a sufficient answer.

Your lordships will permit me here to take notice of an observation from the noble and learned lord on the woolstack, at the time he gave us the hint I have been mentioning, respecting our plea; and that is, that it does not appear by the replication, that the corporation were ever continued after that judgment of seizure had been given.

Though I claim the fullest indulgence that can be conceived or intended after a verdict and which the statutes of Jeofails, particularly that of Harry VIII. which cures all mispleading, can give me, yet I deny to them every advantage which I claim to myself; with the closest reserve, and most niggard parsimony, and their replication must stand with all its imperfections on its head; I mean not to confine the pleading merely as to form, but that it must be well pleaded in substance; and, perhaps, the distinction which I before alluded to, explains my meaning better than any

any thing else ; namely, that an averment of a fact, which appears upon their own shewing to be bad, would not help any informal pleading.

But before I go into these particulars, your lordships will be pleased to let me take notice of the objection which fell from a noble lord, respecting the seal under which this charter of Henry VII. was granted ; and if it should appear that that charter was in its creation void, a great deal of trouble will be saved to your lordships in considering the other question, which will arise, if your lordships should not think that defect avoids it.

It was admitted (indeed it could not be denied) that, by the common law, all grants of the King must pass under the great seal of his kingdom ; and an authority was cited by Mr. Bearcroft (if an authority had been necessary for the purpose) to shew, that they were neither pleadable, nor to be taken advantage of in any other way : I know that that is confined to common law, and I mean to make some exceptions, which I shall by and by state, as the only ones to the general rule, where, by the customs and usages of some courts of justice (particularly the court of Exchequer) some grants are allowed under the seals of the respective courts ; with this exception, I believe there is no case can be stated by which the King can grant authorities, liberties, and possessions, but under the great seal.

And when your lordships come to consider the cases they have cited, I am much mistaken if every case they have cited does not prove directly against them ; for they are all cases respecting the duchy of Lancaster, which stands upon perfectly different grounds, which affords an inference directly contrary, and which will, when it comes to be examined, make it appear, that even in that duchy no grant could have ever passed under the great seal, if it had not been a power expressly reserved by act of parliament.

I have before me *Plowden's Reports*, and there is a famous case, page 212, respecting the duchy of Lancaster, which decides all these questions upon seals. It was debated at Serjeant's Inn, before all the judges of England, with great deliberation and much learning.

A case it seems was referred by Queen Elizabeth to *Dyer*, chief justice of the Common-bench : I will read the names, to shew what very respectable abilities filled the bench, to whose decision the matter was referred ;—*Saunders*, chief baron ; *Rastal*, one of the judges of the King's-bench, and also one of the justices of assize in the county palatine of Lancaster ; *Brown*, one of the justices of the Common-pleas ; *Corbit*, one of the justices of King's bench ; *Wison*, one of the justices of the Common-pleas ; *Frevil*, one of the barons of the Exchequer ; *Carus*, Queen's serjeant ; Serjeant *Puttril*, who was the other justice of assize in the county palatine ; *Gerard*, the Queen's attorney ; *Ruswel*, the Queen's solicitor ; *Corell*, attorney of the duchy ; and *Plowden*, who was one of the counsel of the said court ; and the case referred to those learned persons, by Queen Elizabeth, was a question, whether a grant which had been made by King Edward VI. in his nonage, should be avoided by reason of his nonage ; that is a part of the case with which I don't mean to trouble your lordships ; but it appears in arguing that case, that all the judges were of opinion, that it was necessary except there were some statute to the contrary, that the grant should pass under the King's letters patent, under the great seal ; they state, that so it has been the practice, with regard to the lands which descended to the King from the Duke of York, the Earl of March, and other of the King's ancestors who never were Kings.

I should state here, that the county palatine of Chester is not separated from the crown by act of parliament ; on the contrary, it was united to the crown in the reign of Henry III. and from that period to this has continued a part of the possessions of the King, *jure coronæ* ; and, therefore, no arguments can arise from what were the only ones that could be adduced in the case of the duchy of Lancaster, because the two cases are distinct, *that* being kept separate, *this* united to the crown.

They

They say, " King Henry IV. was son and heir to John of Gaunt, who was one of the sons of King Edward III. and also son and heir to Blanch, wife of the said John of Gaunt, who was daughter and heir to Henry Duke of Lancaster; so that the duchy of Lancaster came to the said King Henry IV. by descent, on the part of his mother; and in this case, if he had not afterwards been King, his possessions should have passed by livery and seisin, and attornment, &c. in the same manner as the possessions of other subjects ought to pass; but after he had deposed King Richard II. and had assumed upon him the royal estate, and so had conjoined to his natural body, the body politic of King of this realm; and was become King, then the possessions of the duchy of Lancaster were in him as King, and not as Duke, for the name of Duke being lower than the name of King, was drowned by the name of King, and by the accession of an estate royal to him who was Duke; for the King could not be Duke in his own realm, though he might out of it; and in like manner the name of duchy, and all the franchises, liberties, and jurisdictions thereof, whilst they were in the hands of him that had the crown and jurisdiction royal, were extinguished by the common law; and after that, the possessions of the duchy of Lancaster could not pass from King Henry IV. by livery of seisin, but by his letters patent, under the great seal of England, without any livery of seisin, or attornment; and so possessions of the Duke of York, or the Earldom of March, or such other possessions which have descended to the Kings of this realm, from other ancestors than Kings, have used to pass heretofore from the Kings of this realm; and so they should have passed until this day, by the common law, if no statute had been made to the contrary; and, therefore, his grant or alienation of the lands, parcel of the duchy, made during his nonage, shall not be avoided by the common law;" and so they took the common law to be in this case.

" The charter states, that the duchy of Lancaster, and all the possessions thereof, should not be altered or changed, by reason that King Henry IV. assumed the royal estate upon him; but that they should be preserved, and continue in the same form, condition, and estate, in which they descended and came to him, and shall remain to the same heirs contained in the charters before mentioned; and that they shall so, in such manner, and by such officers and ministers, in all points remain, be ordered, governed, and demeaned, as they should have been if he had never been King."

Then they proceed to consider those statutes which were made to the contrary, in the case of the duchy of Lancaster; and they state, at length, the charter of Henry IV. of the separation of the lands and possessions of the duchy of Lancaster from the crown.

Then they consider the part of the statute, entitled, a statute touching the seal of the duchy of Lancaster; and by that statute it appears to be expressly enacted, that, for the future, no grants of that duchy shall be made under any other seal of the King, great or small, except under our seal for the duchy aforesaid.

Then they state, in these words, " And by these words, as well as the other words in the act, by which it is ordained, that Henry VI. should forfeit to King Edward IV. and to his heirs, and to the crown of England, the hereditament of the duchy of the county palatine of Lancaster, and the court of the duchy; and the liberties and franchises thereof should have been utterly dissolved and extinguished in the crown, if there had been no other provision made in the act for the crown, which receives any hereditaments, by escheat (as it did this here) merges all jurisdictions, franchises, and liberties, had and used in them, which were before derived from the crown, for the greater extinguishes the lesser; so that the act having relation to the fourth day of March last past, on which day King Edward IV. began his reign, would have extinguished the said county palatine, and the said court, and the liberties thereof, from the said fourth day of March, thenceforwards for ever, if it had stopped there without making any other provision; but to raise it up again, it was necessary to have a new erection, or a saving, by words proper for it; and, therefore, King Edward IV. being desirous that the duchy, and all that belonged

belonged to it, should be as it was before, as to the order and direction of it, he made a new establishment thereupon by the act whereby it is ordained and established, that the same manors, castles, &c. should, from the third day of March, be the said duchy of Lancaster incorporate, and be called the duchy of Lancaster—and that the county of Lancaster should be a county palatine—and that the King should have, as parcel of the duchy, the same county palatine, and a seal, chancellor, and so on.”

So that this act established and confirmed the county palatine, from the third of March; after that time no seal, but the seal of the county palatine, was good to pass his grants; but again they state, that if it had not been for this, by the common law, and without some statute to separate it, it must have passed under the great seal of England. And they state, that when the duchy was united to the King, that was the only way by which grants of that duchy could pass; if that is the case, and it appears by these authorities, that if it had not been for a special act of parliament, the grants of the duchy could not pass under the duchy seal; then it follows, that no case, and no arguments, drawn from the duchy seal, in the county of Lancaster, apply at all to the case of the county palatine of Chester, which has been united to the crown ever since the time of Henry III.

My learned friends, or rather those who assist them, still keep pouring in new materials with the most useless diligence and fruitless industry. They suppose that there is something in a document, which is now, for the first time, produced, from which your lordships are to take notice judicially, that this charter of Henry VII. has received the sanction of parliament; the statute they quote, is the act for levying fines, with proclamations for lands, within the county of the city of Chester; and that act, as far as is material for me to state, only recites that the former act for levying fines there, does not extend to lands of the county of the city of Chester—“the said city, with the suburbs and hamlets thereof, and all the land within the precinct and circuit of the said city, suburbs, and hamlets, being long before our late sovereign lord, of famous memory, King Henry VII. by his Highness's letters patent, bearing date at Chester, the sixth day of April, in the one-and-twentieth year of his reign, divided, excepted, and in all things separated, from the said county of Chester, and from thenceforth made and appointed to be a county by itself.”

Now my lords, admitting for a moment, which I think is the utmost extent of admission that can be required, that facts in the recital of acts are to be received as evidence for the purposes of those acts which proceed to enact upon them, it will never be contended, and is a perfectly new idea, that your lordships can consider these facts so recited, as being evidence farther than for the purposes the act requires; and in this case, the single subject-matter of that act, and the single matter which it was necessary for the legislature to take notice of, was, that the city of Chester had been separated from the county at large—not a word of a corporation being granted to the city of Chester—not a word in this statute of Queen Elizabeth, that there were any mayor, aldermen, or persons of that description.

Admitting then, for argument's sake, that if this had been a question about levying fines, your lordships must have seen that the city of Chester was divided from the county, by the letters patent of Henry VII. I will ask, by what judicial authority you are to take notice, that this charter of Henry VII. under the seal of the county palatine of Chester, is the charter mentioned in the act? Letters patent mentioned in an act of parliament, must be *prima facie* considered as letters patent under the great seal of England, which is the only way in which letters patent can be granted. You are then to say, that this charter, granted under the county palatine seal, is that charter recited in this act, without even so much as an averment upon the record, that the two charters were the same. It might admit of some doubt, whether even the averment, so made, would be tenable in law; for a man cannot aver that which is impossible.

I think,

I think, that if they had even averred upon this record, that these letters patent were the letters patent mentioned in that act; so as to have brought them judicially before your lordships, the evidence contained in that act cannot be cited farther than to shew, that the King had separated the city of Chester from the county palatine. Your lordships cannot take notice, that this charter was the same charter—for it is not impossible but that two charters should be granted upon the same day, one under the great seal, the other under the seal of the county palatine; and that the privileges granted to the city, under the county palatine seal, should state that separation, but superadd a grant of other franchises to be enjoyed by the members there created. It should seem to me, therefore, that even upon this part of the case they do not advance the argument one step, and that they prove nothing more than that, by some charter made by Henry VII. on the day this other charter bears date, he separated the county palatine from the city.

If that does not carry it farther, then we must next inquire whether or no, when it appears to your lordships, that there is no sort of ground to state, that any of the King's possessions, in the county palatine of Chester, ever passed under the seal of that county—when it appears in the arguments adduced in the case of the duchy of Lancaster, that if it had not been for the statute I have mentioned, even the duchy possessions could not so pass—we must next inquire, whether there is any thing else which they can even suggest in argument to shew, that the King has a power of granting under the county palatine seal.

Since your lordship suggested this doubt, I have been considering it as well as I could, and I have not been able to collect any instances of any act being done in the county palatine, under the seal of that county palatine, except judicial acts. I must admit, that original writs are issued at Chester, under the seal of the county palatine, in the name of the King attesting them himself—"Witness ourselves at Chester."

I have been endeavouring to find out the reason why this exception should remain: If it stood without an answer, I don't think it will go far, for it is all still confined to the case of judicial proceedings; but it has occurred to me, that probably this very practice of issuing original process, under the seal of the county palatine of Chester, might arise from the circumstance of its being a county palatine at the time when the cursitors of the court of Chancery were first established; and when the kingdom was divided into several counties, giving each a part, and this was not a part of the King's dominions; there is no officer now who can make out an original writ under the great seal.

Your lordships know the petty bag side of Chancery is of great antiquity—I believe coeval with the common law. So long ago as 18 Edward III. these cursitors appear to be an ancient office, they are of indefinite antiquity, before this county palatine was annexed to the crown by Henry III. the privilege which is not attached to the court, but to the county palatine, into whose-ever hands it comes—the privilege of making writs out in a county palatine, where they had *jura regalia*, was one that was used; from the distance of this province, it is not very likely, that when annexed to the crown, the people should be desirous of coming to Westminster to have writs made out, and if nobody were to complain, or to apply to the great seal here, they might continue granting original writs, which it certainly is the practice to do. This is the only solution that occurs to me upon the instant—I don't know whether it is satisfactory; but I may admit, I think, without exception, because it proves nothing more than that judicial process may be issued under that seal, but without its appearing ever to have been in use; no argument can be adduced from thence to shew, that the King can grant liberties, as granted here, under any authority but the great seal.

I said before, that there are some leases granted under other seals, and particularly in the Court of Exchequer; a particular instance I observed in Auditor *Curle's* case, 11 *Coke* 4, it was resolved, that the King's nomination to that office, should

be under the great seal of England, and not by word, nor by the privy seal nor signet, &c.

In the *Queen v. Dodington*, *Moore* 475, it was admitted by *Coke*, against his own argument, that for his inheritance or chattels real, the great seal was necessary. Then there is *Lane's case*, 2 *Report* 16, which says, that a lease under the seal of the Court of Exchequer, is held to be good by the course and practice of the Exchequer; for the customs and courses of every of the King's superior courts are as a law—and the common law for the universality thereof doth take notice of them, and it is not necessary to alledge in pleading, any usage or prescription to warrant the same.

Therefore, except in these excepted cases, I submit nothing yet has appeared, either judicially or extra-judicially, which can shew that any of the arguments to make a grant good, under the seal of the county palatine of Chester, at all make out that position.

We are then told, that even admitting the charter of Henry VII. to have been originally void, there is a new grant or confirmation of it by Elizabeth; and the learned serjeant being well aware that there can be no confirmation of a void grant, said it was a re-incorporation; I don't think that solution helps my learned friend at all, because it is likewise an established rule of pleading—and I have occasion to resort to those rules frequently—that every deed must be pleaded according to its legal operation; and in the present case, even supposing that that grant of Elizabeth might have had the operation of a new grant, it should be pleaded as a new grant, or else it is bad, and not cured by any thing pleaded here.

Lord Loughborough. Before you leave that part, have you looked at the act of the 20 Richard II?

Mr. Bower. I am not prepared to argue that.

Lord Loughborough. It cannot be expected you should. It seems an act reciting, that the King and his predecessors have been earls of Chester; then the act goes on and changes the title of earl, into the title of Prince of Chester—annexes some other lands to the county of Chester—and provides, that all the inhabitants of the county of Chester shall retain and have their antient immunities—and that it shall never be granted to any but to the eldest son of the King.

Mr. Bower. I thank your lordship for the suggestion. The answer that occurs to me is, that supposing every thing stated in that act to be true, it cannot affect the King at all; it is an act which reserves to the subjects of that county—to the persons who are privileged by living in that county, all their privileges and liberties entire, it cannot include the King. It is no liberty of the people of that county, that the King should grant under one seal or under another—he is not affected by any alteration that is made there. The act does not import, that it was intended to make any alteration; and it will be for my friends to make out, that it is some liberty annexed to the inhabitants of that county, and which belongs to them as inhabitants, that the grant shall be under one seal or another; besides, it is suggested to me, that the King is never affected by any statute, unless he is named, and it does not occur to me, that any of the provisions in that act were made to affect the title of the King in any respect; it is for your lordships, who have the statute before you, to form your own conclusions upon it, but I should humbly have conceived, that the King not being named here, and nothing appearing to affect any of his liberties, the act could not be extended to the manner in which the King shall do his acts, but merely to preserve the liberties and franchises of that county palatine.

I had got to another point of the case, and was answering the arguments that had been used by my learned friend—that if the charter was originally void, it could not now be set up in this shape, as a confirmation, and that it should have been pleaded as a new grant.

Now I will, upon this part of the case, trouble your lordships with only one note, which shews how essentially necessary it is that grants should be pleaded according to their legal operation, and that where they are not so pleaded, it is reversible

verfible after judgment, upon a writ of error. It is the cafe of *Baker v. Lade*, 4 *Modern* 149, that was error of a judgment in the Common-pleas, in replevin, wherein the defendant (Baker) made cognizance as bailiff to Nicholas Marfh, &c. and fets forth, that before the taking the cattle, one Robert Lade was feized in fee of the place where, &c. who, in confideration of 100l. &c. did, by deed, grant to Nicholas Marfh, grandfather to the avowant, a rent of eight pound per annum, in fee, with a clause of diftreff—that by virtue thereof the faid Nicholas Marfh became feized of the rent, who devifed it to Richard Marfh, and his heirs, &c. who by deed, &c. for and in confideration of natural love and affection, and 1. to be paid to the grantor, yearly, during his life, transferred to the defendant the faid rent, to him and his heirs forever, by virtue whereof, and the ftatute for transferring leaſes into poſſeſſion, the defendant was feized; he diftrained for fix years rent.

The plaintiff demurred, and the defendant joined in demurrer. The firſt objection to the pleading was, that the place where, &c. was not plainly and ſufficiently alledged to be charged with his rent, at the time of the grant thereof, made to Nicholas Marfh, the grandfather; for it ſhould have been ſhewn, that the place, &c. did belong to the faid meſſuage, or that it was in the occupation of the grantor at the time of the grant, as well as at the time the diftreſs was taken; it ſeems that objection had no great weight. The ſecond objection was, that this was pleaded as a grant at the common law, by the words *conceſſit*, *affignavit*, &c. without attornment or inrollment, it being in confideration of money paid, &c. and for this reaſon the plea was not good, and of this opinion was *Pollexfen*, chief juſtice; but the other juſtices *contra*; for they held, that the confideration of the grant being as well for natural affection as money, it would amount to a covenant to ſtand feized, &c. and might be pleaded without an inrollment.

“Upon this judgment writ of error was brought, and it was now agreed, that admitting this deed did enure as a covenant to ſtand feized, &c. it ought not to have been pleaded by the words *dedit* and *conceſſit*, &c. but as it operates by law, *nidelicet conceſſit & aggeravit quod*,” &c.

Then he ſtates other objections; he then goes on and ſays, that the word *demſit* is not only applicable to an eſtate for life or years, but to an eſtate tail; or in fee, but it muſt be pleaded as ſuch.

He puts many inſtances to prove this matter, as if one joint tenant maketh a feoffment to the other, this cannot make a good deed at the common law, for he cannot make livery and ſeiſin, becauſe the other is jointly feized with him; yet this deed ſhall enure by way of confirmation, and muſt be ſo pleaded, and not literally as the deed is worded.

Coke, in his comment upon *Lyttleton*, ſays, that *dedit* or *conceſſit* may amount to a grant, to a feoffment, to a gift, leaſe, releaſe, confirmation, or ſurrender, and that it is in the election of the party to uſe it to which of thoſe purpoſes is moſt agreeable with his intereſt; and, therefore, he may plead it as either, which ſhews, that the pleading muſt be as the deed doth enure and operate, and not as the words are in the deed itſelf; and, therefore, if one joint tenant plead that the other *conceſſit* to him, &c. this plea is ill, becauſe a grant is not a proper conveyance from one joint tenant to another—it muſt be by releaſe; but if a jury have found *quod conceſſit*, that being the ſaying of the *Lay Gens*, would have been helped by the court, and adjudged to be *quod relaxavit*. If tenant for life grant his eſtate to him in reversion, this is a ſurrender, and it muſt be pleaded according to the operation it hath in law, and for this reaſon chiefly the judgment was reverſed; that is, becauſe though the deed was pleadable in the way that would have answered his purpoſe, if he had pleaded it right, yet having only pleaded in the words of the deed, and not according to its legal operation, it was bad, and the judgment was reverſed for ever.

I apply that, in the preſent caſe, thus; this confirmation of Elizabeth, which my learned friend Mr. Serjeant Adair argues as a re-incorporation, might have, if it

had any effect, been pleaded as a grant—as a confirmation, if pleaded, it can have no effect; for the confirmation of a void thing cannot be a confirmation, it is to make good and enlarge something already in being, an estate voidable, and not one actually void. If, therefore, the charter of Henry VII. is void, for the defect of the seal, as I humbly insist it is, nothing in the charter of Elizabeth can help it—in the first place, because it is used as a confirmation, and therefore void, and because my learned friends have not pleaded it as a new grant of charter or incorporation, to the citizens, at that time.

I have now done with the preliminary objections to the replication itself. I am exceedingly sorry to find that there is so much matter behind, upon which, much against my own inclination, I must detain your lordships; for I have only got through the preliminary objection. Although this objection appears to my mind decisive, I cannot tell what your lordships' better understanding may think; if your lordships think this is not decisive, but that we should enter into a consideration of the merits of the replication, I am bold to say, I think there is not any one part which can be maintained, nor any one argument, in support of it which cannot be answered.

That I may make myself intelligible to your lordships, and take that course which my understanding leads me to think is the plainest, I will begin with considering the main objection, and that is the effect of this judgment *quousque*—that seems to be the hinge upon which my learned friend's arguments turn—it is upon the judgment *quousque* that they entirely rely.

Lord Chancellor. I believe it will interrupt the course of your argument if we go on. The remainder of it, from the nature of the subject, cannot fall within a very narrow compass.

Adjourned.

February the 20th, 1790.

Mr. B O W E R.

ONE of your lordships yesterday referred to an act in the reign of Richard II. relating to the county palatine of Chester. I find that act of parliament which was made in 1397, was, together with all the acts of that session, repealed by the statute 1 Henry IV. only two years afterwards.

Lord Kenyon. I believe the point, as an observation upon that statute, was, that Chester is stated to be a county palatine, and that the county palatine of Chester was, by that act, turned into a principality. Now as to the principality, the repealing act is an effectual answer; but as to the description, the thing seems to remain.

Mr. Bower. I shall not trouble your lordships with any further observations upon it, but proceed to answer one inference drawn by my friend Mr. Serjeant Adair, from the act of Henry VIII. cap. 24, which, he supposes, enacts, for the first time, that the justices of the peace, and the several officers who are to be appointed in the county palatine, shall be appointed under the great seal of England; and from which he infers, that until that time, they could not be constituted under any other seal but that of the county palatine. Undoubtedly that inference will not follow; for your lordships find, that neither in Wales, nor the county palatine of Chester, were there any justices of the peace at all till the statute of 27 Henry VIII. cap. 5, which constitutes them, for the first time—and they are by the express terms of that statute, constituted under the great seal of England; and, therefore, this statute of Henry VIII. cap. 24, could not include, or rather be supposed to relate to the county palatine of Chester, because it makes a provision, that those offices should be granted under the great seal; whereas it appears by a statute before, that from the origin of their foundation, they were constituted under the great seal, and that was only by a statute made in the same year, a few statutes before that in question.

I shall

I shall conclude upon this ground by observing, that the county of Chester, and principality of Wales, are almost, in all respects, upon the same footing; and that your lordships will find, that in almost all the counties in Wales, original process issues under their several seals and courts of Chancery, and that patents are constantly under the great seal, when they affect matters arising in that principality; therefore, considering Wales and Chester as upon the same footing, it will follow, that the purpose for which a seal is used in making an original process, is the same in both—and that it does not affect the King's right under what seal he shall grant his possessions there.

Having done with that part of the case, I shall proceed to examine the matter of the second replication, if your lordships think I am now at liberty to enter into it; and when I have examined the nature of a judgment of seizure, it will appear to your lordships, that under the circumstances of this case, and by the consequences which have happened here after that judgment of seizure *quousque*, the corporation (supposing it to be well granted at first by Henry VII.) must, upon this record, appear to your lordships to have been dissolved.

It will be necessary, perhaps, to call your lordships' attention to the doctrine of Lord Coke, or rather to his explanation of the statute of *Glocester*, 6 Edward I. and to advert to the situation in which things stood before that act of parliament was made; and your lordships will find, by looking into 2 *Inst.* 282, that before the making of the statute of quo warranto, the King had used to seize liberties, and to seize forfeitures himself, without giving the party any opportunity in which he could discuss the question in a legal course. The exercise of this prerogative, however well founded it might be in the law, at that time, was undoubtedly most arbitrary and oppressive, and produced great complaints, as it was natural to expect it should, and the King, disposed to listen to, and to remedy those complaints, as far as he could, enacted this statute, by which he gave an opportunity to persons, whose privileges and liberties were attached, to come in upon certain terms prescribed by that act; when, therefore, a *venire*, given by that statute, was issued against any party, and he did not come in pursuance of that writ, the King seized the franchise, as before the making of that statute he had been used to seize it, without calling upon the defendant at all; and I will submit, that by that, the prerogative was so far restored to him, that upon the making of seizure, he was precisely as before the making of that act which gave him an opportunity, by a subsequent clause of it, to come in. If then the King was seized of any thing by this seizure, he had acquired a certain defeasible title in the thing which he had seized—if it had not been for the subsequent provision of this act, the title which the King had acquired by the seizure upon the parties not coming in upon the *venire*, would have been precisely the same title, which, till that act passed, he would have acquired by his own act of seizure; and if it had not been for the other provision, the party could have had no remedy; but then a provision is made in that act, in the nature of a condition subsequent, which says, that this defeasible title which the King had acquired by that act of seizure, should, in fact, be defeated if the party will come in and replevy in a certain time; the act which is to be done is an act moving from himself—it is at his option, whether he will perform that only condition by which he can get back the distress which the King has had in his hands; and if he neglect to perform the only condition, by which (by the act) he is entitled to get it back, it must remain in the King, because there is no authority nor power by which he can get at it. And supposing this original process is, in its nature, a mere process of distress, yet if no act is done to divest that property which the King has acquired by the seizure, it must follow as a necessary consequence, that the thing which is once in the King's hands, cannot be taken out of it again, unless the terms upon which alone the party is entitled to recover it, are complied with on his part.

Supposing the case of a common distress, and supposing while it remains in my hands, the party whose property it was, should die without leaving any real or personal

sonal representative; it would follow as a necessary consequence of the act which I have done, that I have the property, because I have acquired the actual possession of that thing which there is nobody in existence to claim against me, or to take from me; and if it should, by and by, appear to your lordships, that though in cases where a franchise was continuing, and in cases where the parties remained in the same situation as they were originally in, that distress might be restored; yet if it should appear, that by the constitution of this corporation, as stated upon this record, and the facts therein stated, that the corporation must be dissolved before any thing was done by which it was attempted to replevy, or the King restore—all the attempts to restore by the King must be void, because the party who was to take them, no longer existed; but I shall shew by and by, that the body must be dead by not only the death of the integral parts, but of every individual who composed it. When your lordships consider, that in the practice of the Eyre before, and by the constitution of the court of Eyre itself, every thing must be determined during the sitting of the justices in Eyre, that law which is laid down will appear to be (even if there were no authority to be cited for it) necessarily incident to the nature of the jurisdiction—and it will appear at Common Law, that a matter questionable in Eyre, must necessarily be decided during the sitting of that Eyre. That this was the practice in Eyre, from, I believe, indefinite antiquity, appears from several authorities: I will cite that of *Brookes, quo warranto*, pla. 7, who states a case determined in the Eyre of Kent, and where the same law prevails as that which I am now contending for.

The next case which we rely upon, and which is stated by the plaintiff in error, in this record, is the case from the year-book of Edward IV. That case it is said is not law—or it is said; that something appears upon the face of it, which shews that Lord Coke was mistaken in his idea of that case and the authority of it, and which shews, that the documents were not such as he thought they were at the time; and in support of this objection to Lord Coke's consideration and construction of it, a case is cited from *Jenkins's Centuries*, and this process is stated at the end of the case itself, to shew, that it is impossible Lord Coke's idea can be right.

Your lordships know that *Jenkins's Centuries* were compiled by that learned judge, I believe, about the time of Cromwell's usurpation; he was not contemporary, therefore, with the determination—he had resort only to those records from which he could draw his conclusions—and he has cited the authority from which he drew that conclusion. If, upon examining the only authority to which that learned judge resorts, it appears, that his conclusion is not right (and no other authority has been stated to support him but this) I think your lordships will not have much hesitation, whether you will give credit to the report in the year-book, made at the time, and by those then authorized to report the proceedings of justice—or whether you will give credit to the opinion *Jenkins* formed, many centuries afterwards, and who had no resort but to that very record; upon examining this record I think it appears, that the learned judge was mistaken, and Lord Coke's idea was right.

It is said, that all the persons who appear to have been acting upon this occasion, were not judges. I agree in that, but in *Brooke's Report* of this case, in *quo warranto* (title *Quo Warranto*) it is stated, that it was a writ of error in the Exchequer Chamber; and though several may appear not to be judges at that time, it is unquestionable that six of the parties upon this record were judges—and of those six your lordships will see, when you inspect this record, that four, at least, concurred, that the judgment was final, or, at least, that the franchise was irrepleviable if the party did not come in upon the return at that time.

The four first persons, *Tremayle, Colson, Fincham, and Catby*, were, we may suppose, the serjeants who argued the case; their arguments will have their weight, if they appear to your lordships to be founded in sense and in law—and it would not be impertinent, perhaps, to read the reasons of some of them which shews, that *Jenkins's* idea upon this case, must be mistaken, because he is supposed

to assert, that "no man shall finally lose his land or his franchise, upon any default, if he has never appeared;" when that argument furnishes authority and instances in other cases where there is that loss incurred before the appearance of the party.

Lord Chancellor. Do you collect that the authority of those judges goes to this—that the forfeiture is incurred upon the return of the *venire*? because I conceive, that in the course of the proceedings, the *venire* must appear upon the record before a *disfringas* should issue.

Mr Bower. I shall contend, by and by, that the *venire* is the only process, and that it is a mistake to say a *disfringas* went upon it.

Lord Chancellor. No *disfringas* is necessary before the writ of seizure; but must not there be a writ of seizure? that is the point which principally presses. That a corporation may be called in by some means or other compulsory, is a proposition the contrary of which it would be mighty difficult to maintain; but the question is, whether it appears sufficiently upon this record, that they were so called upon as to have the exercise of their franchise suspended? and the true point of argument which presses, seems to be this—whether it is sufficient that their default existed unless a writ of seizure went out? and unless a writ of seizure was returned? because it is one thing to say, that if the writ of seizure issued, and the sheriff returned it (though the franchise be incorporeal and incapable of manual occupation) yet if it is returned upon record to be seized, in estimation of law it will be so, and there is an end of the functions of those who are to exercise it. But the question principally upon this is—whether there ought not to have been a return of the writ of seizure before they were to be put to replevy, or before any entry of replevy could be put upon the record?

Mr. Bower. I will endeavour to shew your lordships, that the King was not only in the seizing, but in the actual possession of these franchises, without issuing any writ of seizure.

Lord Chancellor. That is right—that is the point.

Mr. Bower. In the case of the King there can be no doubt, but that wherever a subject has a right to enter for a condition broken, the King has a right to seize. Whether he is in by that right of seizing, or whether a writ of seizure is to issue, I understand is your lordships' only difficulty.

It is determined then, that wherever the King's title appears, by any matter of record, an office is not necessary; that is in *Stamford's Prerogative* 56, A. it is determined, that wherever the King's title is found to lands or tenements, the King shall be in possession immediately, by office found, without seizure.

9 *Coke* 55, B. 96, B. and the case of Sir George *Reynel*, will shew your lordships, that in the case of an incorporeal hereditament it is most clear, that the King is, by the award of the seizure, and not by the writ of seizure, in the actual possession of the franchise.

In Sir George *Reynel's* case, which was for the forfeiture of the Marshalsea, there is in page 95, which I have cited, a great variety of cases put, where the King shall be in possession before any seizure; I shall not trouble your lordships with repeating them, but beg you to advert to what is stated in page 98 of that case, which is a case of great authority—the chancellor called upon the chief justices to assist him, and it appears to have been argued at much length, and with great consideration. There was a question put to the judges of that day, pretty much the same as to your lordships this day—"If the King might seize without a writ of seizure? The chancellor asked how this seizure should be made? And I answered, that by the office, and the award of the seizure, the King is in possession without any writ or commission for that purpose, but that there should be a writ of discharge directed to Sir G. *Reynel*. The King was in possession by the award, by what was done by the court; for it will hardly be contended, that this judgment of seizure is not equivalent to an office found."

By

By this authority it appears, that by the award of seizure, in the case of an incorporeal hereditament, the King was in possession without any writ or commission awarded for the purpose; but it seems to say, that it would be right, notwithstanding, to issue a writ of discharge—not to better the King's title—not to make any difference in that right which he had acquired, but to discharge the party from consequences.

The arguments that are used by Serjeant Pemberton, in the case reported in *Shower* (Sir James Smith's case) shew the propriety and necessity of writs of seizure, in certain cases—and they shew those cases too in which they should be issued; where it is a franchise which is profitable—there a writ of seizure shall issue; where there is a visible and a tangible property, therefore, of which a profit can be made, the good sense of the seizure appears; but where a writ of seizure would be a mere nullity—where it could have no possible effect, then that maxim which is laid down in Sir George Reynel's case, undoubtedly, applies; and that this could be no notice to the party, is most manifest, the sheriff is directed to seize the liberty of being a corporation—he is to do no act—there is no visible or tangible property, which he can either seize or take notice of.

Supposing it to be the case of a forfeiture, against a corporation not clothed with any franchise or liberties, but the mere authority of being a corporation, and acting in that character; then if the sheriff could not seize, he must only return that writ, and the parties would have had notice in consequence—not would any act be done which would alter their situation.

I was going to read to your lordships the argument of Mr. Serjeant Pemberton, in *1 Shower* 276, in the case of the King *v.* the city of London. “There are several sorts of judgment, as seizure in the name of distress, and there they remain forever unless they come in and replevy them the same term or eyre; if there be a *distingas*, then there is a judgment of *ouster* forever; if he makes a title, and judgment be for the King, then it is good.”

Yelv. 190. In all these cases, the party is immediately ousted of the liberty: here it is, *quod capiuntur in manus dom. regis*; and *quod capiuntur* in these judgments is the same with or tantamount to *capiuntur*, as in a judgment *quod recuperet versus &c.* upon which he cites 9 *Rep.* 90, and *Rastel's Entries* 540. I have looked at that entry, and the reference to it is here correct, as appears by the award, that the leet, which was the subject-matter of seizure there, was presently in the King's hands; I have looked at that record, there was no writ of seizure issued, of course no return, by the sheriff, of his having seized it; but your lordships will find, that that upon the award of seizure, the next step upon that record is, that replevy which your lordship seems to think the writ of seizure made necessary, or the party would not know that there was any seizure upon record.

If the King is in possession, by the award of seizure, the replevy comes as a matter of course. Then the parties might come in to replevy, and they were entitled to no other notice under the statute of *quo warranto*, than that original notice which was given them by the *venire*; and your lordships know, that having that notice, they must be supposed to be cognizant of all the consequences that would follow from their not taking proper care to avoid the judgment that would be given.

Lord Holt, in the same case, folio 280, gives another instance to shew, that no writ of seizure can be necessary, and that the King is in possession by the award of it; he observes, that the return to that mandamus agrees him duly elected, according to the ancient custom of the city, and that he continued so, and did not duly take the oaths; if this, he says, were not in the case, it would be a good return. “The question is, whether the return is not contrary to what is particularly recited in the act of parliament, which is now a public act? there is no officer, as alderman, now, but as an adviser in a corporation, and the being of an alderman depends altogether upon the being of the corporation. Whether by this judgment, as it is recited, we cannot construe this corporation to be dissolved, I will not give my

my opinion concerning the effect of the true judgment; I am of opinion, that a corporation may be forfeited if the trust be broken, and the end of the institution be perverted. Then, whether a judgment to seize a corporation doth dissolve it, I agree is not so proper, for the King cannot have it." He then states several cases, in which judgments, of different sorts, may be made, which I don't think are material to this part of the case.

In answer to an argument which was urged by the attorney-general (Treby) who said, there could be no such thing as a discretion in matters of that kind. Serjeant Pemberton says, "I did not expect to hear any argument; but surely the act of parliament recites a judgment of seizure of a corporation into the King's hands, as forfeited."

Lord Chief Justice Holt then says, "there needs no writ of execution, for in a *quare impedit*, if judgment be against the incumbent, the patron presents, without any more ado, and then, if the judgment did not seize the corporation into the King's hands, what need of the act of parliament? and, therefore, I would hear my brother to that query—if the corporation were gone by this judgment?" He says, upon the very award, therefore, no writ of execution is necessary—it is an incorporeal hereditament—the King is immediately in possession—he presents, and then the matter may be brought into discussion; but to perfect his title, it is his by the award of seizure, and no writ of execution need to issue upon it.

Upon these authorities, and upon others which I dare say will suggest themselves to your lordships, proceeding upon the same principles, you will find, that a judgment, or an award of seizure, is all that is necessary to the King's title; there is no case, that I know of, whatever, where the judgment does not vest that title till the act for marking particular days: even in the case of common persons, all rights which attach under a judgment, undoubtedly vest in the party by the judgment itself; and it appears, that the King's right is so far different from another person's, that he should be judged in actual possession, where another party would be put to another step to get possession.

Supposing, however, that the process was erroneous, and that the court there gave judgment without a proper notice to the party; unless my learned friends can go the length of stating to your lordships, that that court had not a competent jurisdiction upon the subject, the consequence will only be, that the court have acted erroneously; and I take it to be a principle which admits of no contradiction, that all judgments of a court of competent jurisdiction, however erroneous they may be, are in full force till reversed by a writ of error; then if it should appear to your lordships, that even upon the statement, as it is set out by the plaintiff (for your lordships observe it is set out by him, and not by the defendant) the judgment was in itself erroneous, unless they could shew, that it had been reversed by a writ of error, or some steps taken to set right that mistake which had been committed, I say it is a good judgment, and your lordships must act upon it here as such.

If we were trying that quo warranto which was filed by Sir Robert Sawyer, and your lordships were sitting here in error, upon the judgment that was then given, all these arguments would apply to shew, that the judgment was erroneous; but no writ of error has been issued—it appears, that it has been acquiesced in—it appears, that till the corporation must have been dissolved, no steps were taken—no steps were taken till those liberties had been granted to another body—and no step can now be taken, because the corporation must have been dissolved by natural death, a long time ago.

I have a paper put into my hand, and I will now lay down a rule of pleading, which will not be controverted, that every thing is to be taken most strongly against the pleader; and if any uncertainty or fault in pleading is introduced upon the record, the party making that fault shall never be entitled to any advantage from it when judgment is against him; if, therefore, there is any thing uncertain or wrong here, it is the uncertainty, the wrong, of the plaintiff, and not of the defendant; if

if he has not set it out perfectly, judgment being against him upon the other parts, he is not now entitled to take any advantage.

I will now see what the plaintiff has set out, and I will prove to your lordships, that by his own shewing he has brought the corporation into a situation in which they must be dissolved, if no steps are taken to keep them alive; and that he has not averred any thing (which it was absolutely necessary for him to have done) to shew the existence of the corporation, after the time when that suspension, which he has introduced, began, till the time when he declares the charter of restoration was granted by King James.

The effect of a judgment of seizure, properly given (or, as I contend, even erroneously given, which must be taken to be proper if not reversed) must be, at least, to *suspend* the functions of the corporation—the process could never be compulsory in any other way; if it neither destroyed nor suspended the functions, it was nugatory to be issuing out processes, one after another, because the party had nothing to do but to stand out, and go on as he did before, to the end of time.

Allowing then (which I think must be conceded) that it operates as a suspension of the functions, when your lordships see, that upon their own shewing, the mayor, aldermen, common-council, every individual officer in that corporation, were only in their office for one year; it will follow, that unless their election was supplied, and other officers were brought into being who could continue that corporation, it must have died years before this charter of restitution, by the death of all those who were necessary to constitute the body.

Lord Chancellor. Is it a clear thing upon the record, as it stands here, that the aldermen would not hold over?

Mr. Bower. I think it is.

I take it the rule I have before offered will bear me out in that; nothing is to be supplied here but the intendment—the want of a substantial averment, though it would be cured by the statute of Jeofailes, in the case of an issue, after verdict, will not be cured in this case, in which no issue has been taken; the whole benefit the party is entitled to, is, that which results by the admission of facts pleaded by the other party; your lordships cannot supply any facts that do not appear; and this is all that is stated—that King Henry granted, that the city should be separated from the county palatine, and that there should be aldermen, citizens, and so on; of which twenty-four aldermen, one should be, by election, put into the office of mayor, and another of recorder; it then states, that every year they shall elect; but it no where appears upon this record, and is no where averred upon this record, that by the terms of that constitution, these officers, who were so annually elected, were to remain in office till others should be appointed in their room; it was a necessary and substantial averment for them to have made, if the fact would have borne them out; they have only shewn an authority to elect for one year—they have not shewn that there was any right to hold over, and, in the nature of the offices, that could hardly be; I don't mean to mis-state the record, I am not aware that there is any thing like that averment, that they were to continue in their offices till others should be elected; I will just cast my eye over it—I believe I can presume to say, it is not so stated; if then it does not appear by their shewing who are the parties that have set out their title, I submit, that the consequence must be, that these offices which they have themselves declared to be annual, should not be considered as having any longer duration; if so, the consequence will follow, which I before stated, that whatever might have been the effect of this process, in its origin—whether, in its nature, it was such as would produce the destruction of the corporation, or not, yet, in the events which have happened, and the circumstances of this case, by matters perfectly independent of, and collateral to, the original intention of that process, it has happened that this corporation, in fact, was dissolved before the charter of restitution, and that there was nobody who could accept of that charter, in the name by which it was granted.

I can

I can cite authorities abundant for it, but one is as good as an hundred :—*Coke Litt.* 264, there can be no grant to a corporation by the name of mayor and citizens during the vacancy of the head of that corporation—there could be no mayor properly elected—there could be none of these parties in existence ; I could have cited twenty cases (I believe there are twenty in the *King v. Pafmore*) where it has been decided, that no grant to a dean and chapter, or any corporation aggregate, by the name of the head and members, can be good if there is no head to whom it can be addressed.

It will follow then, that in this particular case, from the nature of the franchise seized, and the nature of the body from whom that franchise was taken and suspended, though the process, in its origin, was not intended to produce the dissolution of this corporation ; it becomes, by incidental circumstances, collateral to its original intention, the means of that destruction, though I may admit the full extent of that argument, that the distress taken should be considered as replevizable—though I may admit that, while there are parties to replevy, still it would follow (as it would in the case of distress which I first put) that if a party had got a title to that, by legal means, namely, by that of a distress, and the persons distrained upon were to die without leaving any person who could claim title under him, that inchoate property which the party had acquired in that distress, must remain in in him—why ? Not because it was intended to be given him by the original distress, but because he has a good property against all the world—against the party from whom it was taken—and there is nobody to interfere with that possession, which, at first, gives a title in the distrainer ; so that even if the first process were tortious, and the King acted with violence—if he was in fact seized of this corporation, and they did not come in to replevy, while any were living—since they can have no successor or claimer under them, it must follow, from the nature of that distress, that the possession of that thing must remain in his hands ; even considering it in that way, I conceive that I should stand upon very firm ground, if I said, that there being a legal possession acquired, from the circumstances of this case, though it was not originally the intention of the seizure, it *was* acquired, and remained in the King's hands till there was no longer a capacity of taking it out, and of course the King's title became indefeasible ; if the King's title was not indefeasible, there can be no doubt but that the King might have granted such title as he had ; if the King has a qualified fee-simple in an estate, as long as a person attainted has heirs of his body, if he grants that estate to another and his heirs absolutely, that grant has been determined to be good, as in the case of *Alton Woods* : the King may grant a *chase in action*—he may grant a mere possibility ; the King then here granted away that estate which was defeasible, and at this distance of time, your lordships will presume the natural death of all the persons who composed the former corporation ; and while that corporation continued together, they had not done any thing to defeat that defeasible title which the King had in him.

It is said, that no man shall finally lose his franchise or his land without appearance. I think I have answered that position before.

The case undoubtedly is mistaken by Jenkins—the case of *scire facias* proves he was mistaken ; for if the King grants lands to one, by letters patent, which he had before granted to another, and the former hath a *scire facias* against the last grantee, to shew why his letters patent should not be repealed ; if he makes default at the *alias* and *pluries*, his letters patent are annulled by his own laches ; that is a case where a man loses his franchise, grant, or whatever it may be, without any appearance.

The case I have before put, of land being lost in a *precipe quod reddat*, shews, that undoubtedly before appearance, a party may lose his land by default.

As to this case of *Quadryng*, it does not appear, that there is any thing in it contrary to the doctrine I am contending for ; because if all this process, issuing out from this famous controlment-roll, proves any thing, it proves, that the clerks in the Crown-office were irregular so long ago as the time of Edward IV. for such a

perfect series of irregularity, and so contrary to what appears by their own shewing, in another part of the case, to be the process, I never saw.

It was said by the learned serjeant, that the process in quo warranto, and in informations in the nature of a quo warranto were different—in one, summons and seizure; in the other, *venire* and *distingas*; and he cited *Siderfin* 86, in support of that position; I turn to *Siderfin*, I observe, that it is *Siderfin's* opinion in a matter no way relative to the case. When he has reported the judgment, he says, "it seems, by comparing the entries in 6 *Coke* (which he refers to) with another book (which he likewise refers to) as if the process in quo warranto, was by seizure and summons, and as if in the other, it was by *venire* and *distingas*." I have looked at those entries—I have examined the rolls in *Lord Coke*, to which he refers, and upon looking at them, there is nothing like the ground upon which he should form his opinion, as he there supposes; for upon these records it appears, that no process was issued, but a *venire*: the date of the roll is put at the end of each of the entries—I have compared that with the time at which, in the body of the entry, the judgment appears to have been given; and there is nothing in these entries of *Lord Coke*, but the ordinary course of making up that record in the term in which the plea comes in; and there is nothing upon which *Siderfin* founds this opinion, but the process of *venire*; and, therefore, this learned pleader (for learned and accurate he was) is mistaken—the process of *distingas* is not the process—and *Lord Coke* was right when he stated, that *venire* was the only process necessary—and that the party lost his franchise if he did not come in upon the return of that writ.

This case of *Quadryng* your lordships find upon the Treasury-roll, was a writ of quo warranto, upon which a summons issued, and a seizure issued, upon that seizure which was made Easter Term, 15 *Edward IV.* the franchise was seized into the King's hands. Now, upon looking at this famous controlment-roll, from the time of 15 *Edward IV.* to the time of the 20th of the same King (a period of five years) no process at all appears to have been issued; it would have been a pretty considerable space to have had that plea discontinued, supposing it was a plea that could be discontinued; then there issued a *venire*, then a *distingas*; finding he can get no effect from his *distingas*, he enters himself, a discontinuance upon the roll of 1 *Rich. III.* he states, that the plea discontinued, and then he goes on adding *distingas* upon *distingas*, then goes *venire* after *venire*, till at last the sheriff, tired of this, sends his correspondent word, that the poor man is dead, which puts an end to the business, leaving the market in the King's hand, as it was seven years before that time; for there is not a single circumstance to shew, that it was ever taken out of the King's hands. I have been led to consider, a little, the form of this judgment, and, I think, the very words of the *quousque* judgment, which are *quousque pro-ut patet, &c.* shew, that it was not a judgment, as my learned friend supposed, *quousque* the parties should come in. Its first purpose was to grant restitution, if the party came in during the time he had to replevy—if the party did not do that, then he could never replevy; but still something further was to be done; for those franchises were kept in the sheriff's hands till they were returned into the Exchequer, to the King, and then the King had the benefit of this *distingas*, or the issues levied upon them.

The judgment *quousque* was a direction to the officers not to dispose of them, but to keep them in their hands, till the court should direct what should be done with them—till the court should do that which, between them and the King, might be necessary, and which it was their duty to do; but, I submit, that if the time for replevying had expired (and upon these authorities I trust it will appear then to have expired) if they had neglected to estreat their records, for any length of time, though the King might have had reason to complain of that neglect, it would have made no difference to the party if he did not exceed his time to come in; but the officers would be accountable, who had the franchises in their hands, for the profits of them, to the King, till such time as they should be returned into that court whose business it is to take care of the King's rights and revenues. I trust I have produced

produced authorities of great weight, and such as cannot lightly be passed over, to shew, that the King is in possession, without any writ issuing upon the award of seizure.

If I have defeated this out-work of this judgment of seizure, the citadel to which my friends are to retire, I think will not be very strong; for to maintain the proposition that a corporation cannot be dissolved, is (as one of your lordships observed) a very strong proposition indeed; to shew that a corporation cannot, upon a forfeiture of the terms upon which it was created, and an abuse of those trusts for which alone it was created, forfeit that liberty, and that a corporation could stand out, and prevent the King from putting this power into hands better able, and more willing, to discharge the duties of it; which they might do if they were not to be suspended (for the King could not create a new corporation) would be to make so many petty republics, independent of all kingly authority, as to the consequences of which, as in the quo warranto the learned judges observed, it requires very little to be said to convince any man's understanding.

I shall, however, in answer to some of the cases that have been cited, say a few words upon that part of the case, merely because my learned friend seemed to argue it so very much at length, and from respect to him, that any thing he seems to think important should not go without an answer.

To prove that a corporation could not be dissolved, my friend cited the case of the dean and chapter of *Norwich*, *Lord Coke's 3d Report*, 76 b. and likewise in *2 And. 120.* *2 And. 165.* and *Fulcher v. Hayward*, *Palm. 501.*

I can only say, that upon looking into the three first of these cases, it appears only, that the court held that by a surrender of a corporation of their liberties, they did not include the liberty of being a corporation—that it did not amount to an actual surrender of being a body corporate, but only of the liberties they enjoyed.

In *Fulcher v. Hayward* I can find no reason given, why a corporation should not be dissolved, unless one, which appears pretty whimsical, given by Justice Whitelock, who says, that the reason is, “if the dean and chapter be dissolved by the surrender, they are *sepo de se*, which is contrary to nature”—that is the only argument I can find, upon which it is argued that it is indissoluble.

The case of the *King v. Grey*, *8 Mod. 358*, is no authority; for it appears not to have been determined—no judgment was ever given upon it.

The case in *Dyer 282*, my learned friend says is mistaken; I am content to have it so, put it quite out of the question, and let it be supposed to be an authority, neither one way nor the other, I don't feel I want its assistance.

Lord Chancellor. Have you had the curiosity to look into the second edition of *Dyer*? Sir George Treby published that edition two years after his argument; and it has not occurred to me to see whether the same passage is in his edition, that he supposes not to be in the original one.

Lord Kenyon. It is in the book, without any mention.

Mr. Bower. It seems to me, that my learned friend, when he has been considering, and stating, that there are no instances of a corporation being dissolved, has read one side only of the great argument in the quo warranto case, and that is the argument of Sir George Treby.

Sir George Treby says, it appears by *Coke, 4 Inst. 228*, that in the case of *Cambridge*, the corporation was only dissolved by act of parliament.

When Sir Robert Sawyer comes to answer this—(page 28 of his very able argument)—therein he shews how very slight the research of Treby had been; he says, “the next precedent I insist upon is, that recited by Mr. Recorder, the case of the town of Cambridge, but lamentably defaced by Lord Coke's marginal note, and Mr. Recorder's averment, that by the record it appears to have been by common consent of parliament: “I rather,” says Sawyer, “insist upon this, for that Mr. Recorder hath acknowledged its force, that it worked upon the corporate right, and was upon a forfeiture, but lays the force of it in its being an act of parliament: when

when in truth it is a plain judgment of a court of law, and it appears by the record it was no act of parliament.

" Mr. Recorder cited the record 8 R. 2, No. 11, 4 *Inst.* 228, and 'tis probable Mr. Recorder looked no further than that book for it. In the margin it is so cited, but miscited, yet in the body of the book, in putting the case, it is truly cited; for the record is 5 R. 2, 45, to 66, and it is evident by the marginal note, and my Lord Coke's saying it was the common consent, misguided Mr. Recorder, to affirm it to be an act of parliament, when the contrary appears by the record.

" The complaint to the King and his council, in parliament, against the town of Cambridge, was for a great riot committed, and an assault upon the university, and the fact in substance is the same as related in the fourth institute.

" It was prosecuted at two suits, the one against the late mayor and bailiffs, who were at the time of the riot, in their natural capacity; the other against the mayor, bailiffs, and commonalty, in their corporate capacity. The writs returnable *coram nobis et concilio nostro*.

" The former mayor and bailiffs appear, and plead in their natural capacity, that they were neither assenting nor aiding to the riot, neither did or said any thing that might turn to the damage of the University, unless only by coercion and outrageous compulsion; and there seem to have been no further proceedings in that suit.

" Upon the other writ, the mayor, bailiffs, and commonalty, appear and pray they may have a copy of the articles which were read to them, and council allowed them, and time to answer, and such answer was returned as mentioned in the 4th *Inst.*

" But in the record it is said, it was answered by the court, and that the court told them, that at present they should not be put to answer to the crime (which must be in order to a fine) but only touching their liberties.

" Then touching their liberties, they put in a plea, by their council, to the jurisdiction of the court, which is omitted by my Lord Coke; only he saith, after many dilatory shifts and subterfuges following therein, the court over-ruled the plea to the jurisdiction, and ruled them to answer in chief, and if not, judgment should be entered by *nihil dicit*.

" They then pleaded a frivolous plea, partly not guilty, partly in excuse, and the King's serjeant replied, and the plea held nought; thereupon they submitted, as to the franchise, to the King's grace, saving, that it might be no conclusion to them if they should be called in question for the crime.

" Whereupon judgment of seizure was only given—the words of the record say thus:

" Nostre Seignior le Roy de Assent des Prelates & Seigneurs en cest Parliament fist seiser la dit Franchise en sa maine come forfeit pur la ditz Causes.

" Throughout the record it appears by all the proceedings, they were judicial, but the plea to the jurisdiction of the court, and the judgment by the King and Lords only are demonstrations; it was no act of parliament, nor adjudged by the legislative power, but by a court of law.

" It appears upon the same record, that the King granted several of the particulars which were seized, to the University, who enjoy them to this day.

There are an infinite number of seizures (which I will not tire your lordships with repeating) mentioned in page 30 of Sir Robert Sawyer's argument, he shews by them, that sometimes the King granted a part of the liberties back—at other times granted none at all—at other times granted some to one, some to others; and in short, he shews the King acted as he thought fit about them—he disposed of all or any part of them, just as he thought proper.

It is said by the learned serjeant, that in those cases, where corporations have been seized, their franchises have gone on. The case he put is of the exercise of a franchise of the city of London, during the time that a *custos* was put in by Edward I. perhaps the liberty of being a corporation was not seized, but only certain liberties annexed to the office of mayor, which were put into the hands of a *custos*; for

for it appears, that there must have been a mayor and aldermen in the court of Hustings, in London; that either shews, that by prescription, a *custos* was held sufficient to continue that corporation—

Lord Chancellor. I apprehend the *custos* continued in the corporation, not by prescription, but by the King's authority; the King may nominate an officer when there is a neglect.

Mr. Bower. It was in that case continued—in point of fact the King here has done nothing to continue it, and in point of fact it was not continued.

The next case cited, was, where it was supposed ten judges were against Lord Holt, in the House of Lords, upon the question, whether a judgment would dissolve a corporation? By the indulgence of a learned friend of mine belonging to this house, who, has the honour to sit at your lordships' table, I had the advantage of looking at the journals before I came here; and so far from any thing of the sort appearing, as far as the proceedings upon those journals go, it is in direct opposition to what my learned friend supposed.

In the first place, the question put was not, whether a corporation could be dissolved? but, whether a corporation could be legally seized? and it was put, upon a bill brought in for restoring the corporation of the city of London; and the question put here was, whether the words, "that judgment was void and illegal," should stand a part of that bill? The judges' opinion having been asked, it was voted by this house, that those words should *not* stand a part of that bill. Then the necessary inference drawn is, that these words were left out of the bill, in conformity to the opinion of the judges. The bill passed the committee without having those words inserted—it never passed into an act, because the King came down the next day and dissolved the parliament; therefore, it affords an inference directly contrary to the inference made by my learned friend.

We are told now, that this judgment is erroneous, in point of form; and the case of Malmesbury is cited, a copy of which I have, and which is a good deal as cited in the extract put into your lordships' hands, but not precisely so; for the learned serjeant not finding any other cause of error in the record, is pleased to say, that it must be because that information is brought against the corporation in their corporate name. It is an easy way of assigning an error to say, "I can find no other reason but that; it was erroneous; and, therefore, that was the error upon which they proceeded." But that is contradicted by several cases cited by Pollexfen and Sir Robert Sawyer; they cite a string of ten together, where writs of this kind were brought against corporations by their corporate name; and from that Malmesbury record I should rather be inclined to think, that the error upon which the house proceeded to reverse that judgment, was of a very different nature from what my learned friends suppose.

And it is remarkable, that this borough of Malmesbury was one of those where the corporation had been ousted by an information filed by Sir Robert Sawyer; it is observable too, that this writ of error was brought the year but one after the revolution. I need not observe how very unpopular all those proceedings of Charles II. then were; many of them were, no doubt, oppressive, though many were sufficiently legal.

Upon the revolution, this record appears to be removed; and your lordships, upon looking into it, will find, what I think is a more probable cause of error than the other; namely, that the information was brought against the corporation—first by its corporate name, and then against particular individuals, for usurping particular franchises; and it might be well thought, that those several titles of different parties, no way depending upon each other, could not properly be included in one information; I am perfectly aware that your lordships will find many instances of it.

There are, however, a collection of cases now put together in the last edition of *Hawkins*, by Mr. Leach, and it seems to me that good principles enough are laid down there, to guide the discretion of the court, in what cases they shall permit several

several matters to be joined together, and the offences of different persons, and where not—and the result, I trust, will be, that it is only proper and allowable to join the several offences of persons in the same indictment or information, where they may depend upon the same title, and where the fault of one is connected with the fault of the other—that, beyond all doubt, may not be the case in this information; then, I think, that if we were to look for error, with the disposition too of the attorney-general of that time (Sir George Treby) not to push matters (which had been in his opinion carried too far) to extremity, your lordships will find a better ground of error there than any supposed error of proceeding against the corporation in their corporate name; for that has the sanction of a multitude of authorities.

But it is immaterial to me whether or no, if that matter was before your lordships in error, you would reverse that judgment or not; I resort to the same argument upon this occasion that I did before, that it is enough that the judgment is a judgment in force—that a writ of error is not brought upon it—and that till it is, it must remain as if it had been ever so perfect.

Lord Chancellor. Suppose all the franchises of that corporation had been seized—their corporate body remaining—should the existence of their body, naked and deprived of all its franchises, have stood in the way of the King's erecting another corporation, for the governing the place, in the form in which the charter of Charles II. runs?

Mr. Bower. I have a word or two to say to your lordships upon that subject: I am of opinion it clearly would not be so—I take it to be very clear, that the King cannot grant to two several bodies, acting in the same place, the same authorities, franchises, liberties, and powers, from the inconveniences that must perpetually arise from the clashing of two co-extensive jurisdictions; but if a part of the franchises are extinguished, the King may grant to a new body, those franchises which the one cannot enjoy, and then none of the inconveniences can happen of one clashing with, and interrupting the other; which is the only reason why there cannot be two upon all occasions.

This matter was considered a little while ago, in the King's-bench, in the case of the borough of *Hellesione*—it is in the Term Reports, Easter, 1789, under the name of the *King and Pasmore*: your lordships will find upon that argument, that this question has been a good deal considered; the report of that case is so long, that I will not trouble your lordships now with reading it, I would rather refer to the argument of the learned editor himself;—that it is only the co-extensiveness of the power that is any objection to the grant, and that the King might grant a charter to others, in the same place where all the members of the former corporation were not gone; for in the case of *Helleston* it is stated, that the members of the old corporation were yet in existence.

But the court, after much consideration and great argument, and I have not read a more learned argument than that of the learned editor of those reports, were of opinion, that the King has a right to grant a new charter, when an integral part of a corporation is gone, without whose existence the functions of the corporation cannot be exercised, and the corporation has no means of supplying that integral part—the corporation is dissolved to certain purposes; in such case the King might undoubtedly grant a new charter—might give the exercise of those powers to another body, which could not be exercised by the body then in existence; and, I think, the judgment, in that case, will answer a question put by a learned lord, that it is manifest the King has such an authority.

That corporations were dissolved, appears from an hundred instances given in the *King against Pasmore*: Lord *Macclesfield* states, that it had been questioned in what way the King might restore integral parts of a corporation dissolved; his opinion is, that the corporation is dissolved as soon as an integral part is gone—and he cites the *Tiverton* and *Banbury* cases, all of which are at full length here; I, therefore, beg,

beg, for the sake of saving your lordships' time, to adopt the learned argument in that report, as far as makes for this question.

I have endeavoured to make myself as intelligible as I could upon a question of a good deal of obscurity; if it appears to your lordships that the defence, as now stated upon the plea, is, in this part of the cause, and after verdict, good; if it appears upon the first replication, that no power of amotion, of all the corporation, was reserved; if your lordships are of opinion, that the power of partial amotion was legal, and if it does not appear upon this record averred, that there was an amotion in fact of all, then the defendant is entitled to have the judgment affirmed.

If, upon the second replication, it appears, that the original charter of Henry VII. was void, because improperly granted, and incapable of confirmation—and, therefore, that the charter of Queen Elizabeth has no effect; if it appears too, that this judgment of seizure, though originally not intended perhaps to produce that effect, did, in consequence of the events which happened in this particular case, and upon these particular franchises, belonging to these particular men, become absolute, and prevent their replevin; if it appears, that there could be no body in existence, under the previous charter, that could accept the grant of restitution, by James II. and if it appears at least, that the corporation is in its nature dissolvable, then, I trust, upon that replication, we are entitled to retain the judgment we have got.

Adjourned.

February the 25th, 1790.

Mr. SERJEANT ADAIR.

My Lords,

THE arduous task now falls to my share of winding up this long and intricate argument, and of adverting to the great quantity of matter that has been so ably urged by both the learned gentlemen opposed to me; and, before I proceed in attempting to follow them, as well as I can, through so extensive a field, it seems only necessary shortly to remind your lordships of the manner in which this argument has been taken up.

My learned friend who spoke first on that side of the question, made an attack, with some asperity, upon my honourable friend near me (which he would have been better able to repel had he stood in my situation) for deviating, as he was pleased to suppose, from the question in the cause, by running into matter extraneous from the record, and launching into those regions of fancy and imagination, into which he alledged the sublime genius of my honourable friend might sometimes happen to transport him; but though that attack might very well have been spared, it seemed to me, that it did not proceed from the heart and opinion of the learned gentleman who made it; because he very early began to follow the example he had so much found fault with; and seemed to be ambitious of nothing but shewing, that his imagination was more active and vigorous, if possible, than that of my honourable friend, by making through the greatest part of what he said upon the subject, still wider excursions, and so as to find some difficulty in returning to the matter in dispute; and there was some degree of good policy and good sense (as there is in every thing the learned gentleman does) in taking that course, because it seems to me, that on the side which it was his duty, as an advocate, to support, it is much easier to declaim than to argue; and it may be much more for the interest of his client, that he should be supposed to have omitted those arguments which he left unanswered, than to confess, that from the nature of the subject, they were incapable of receiving an answer.

My other learned friend, instead of finding fault with my honourable friend near me, has also taken up his example in the outset of his speech; for he has adopted some

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some of the elegant metaphors which have been lent him by my honourable friend, and he has begun with stating to your lordships, that neither threats, challenges, defiance, or seduction, should induce him to descend and meet us in the plain, in this case—but that he would keep himself securely intrenched in the fortrefs of this record; from whence it should not be in our power, by any thing we should say, to draw him.

My learned friend shewed still greater discretion in taking that line; but it cannot have escaped your lordships' notice, that this plain, into which no defiance or artifice should induce him to descend, is nothing more nor less than the broad foundation of law, and the justice of the case; and that the little fortrefs, in which he wishes so securely to intrench himself, is the narrow limits of what is imperfectly stated upon this record; and, therefore, however I shall be obliged to take my learned friend upon his own ground, and to attack him in his intrenchment—and though, I believe, his courage will not suffer him to make a voluntary capitulation, I hope your lordships' justice will, at length, oblige him to deliver up the citadel *to the King*, to whom all fortresses ought to be surrendered.

I shall endeavour, in a case which has already occupied so much of your lordships' attention, to stick as closely to the arguments which have been used by my learned friends, and to the subject-matter of reply, as the nature of it will permit; and though in doing so I must trespass more upon your lordships' time than I could wish, yet I will not add to that fault, by taking up any of it in apologies. I shall, therefore, take the order that has been adopted, I think, by both the learned gentlemen (for they seem to have pursued the same) of dividing this subject into three parts.

First, considering the case as it stands upon the defendant's plea—and, afterwards, the effect of what is introduced into the record by the first and the second replications, on the part of the relator.

The objection to the defendant's plea, notwithstanding the very able and ingenious manner in which it was attempted to be obviated, still appears to me to have too much force to be deserted; for though a very plausible answer has been given, I think, it has missed the real point of the question, and fallen short of that conviction which the importance of it requires.

The objection arises from principles which, I am sure, are sufficiently established in your lordships opinion—that in proceedings by *quo warranto*, it is not incumbent upon the prosecutor to prevail by any strength of the case which he himself should alledge and bring before the court: it is sufficient for him to alledge the existence of the franchise, which is the subject-matter of the *quo warranto*—that it has been usurped by the defendant—and to call upon that defendant to counteract the charge of usurpation—not by a general denial of it, which your lordships know has been repeatedly adjudged to be nugatory—but by a precise and distinct statement of the title under which he claims that franchise; and it is incumbent upon him so to state that title, that the court, before whom it comes for judgment, shall be able, without departing from that record, to see every thing upon the plea alledged by the defendant, sufficient to give him a complete and perfect title against the crown.

My learned friends have been driven to pray a great deal of aid from the statute of Jeofails, in this case, and from that clause in the statute of Queen Ann, which undoubtedly extends them to proceedings in *quo warranto*; without that statute they could not have had even a colour of argument in support of the present plea.

A number of cases have been cited by Mr. Bower, in which, perhaps, it would be trespassing unnecessarily upon your lordships' time, minutely to follow him; but some of which I shall take notice of, for the purpose of distinguishing that principle, “that after verdict, such facts as appear necessary to support that verdict, and without which the verdict would be clearly wrong, ought to be intended;” certainly that principle, if considered as a general one, is much too wide—to say that after the verdict, *every thing* shall be intended that is necessary to support that verdict,

dict, would be to say that a verdict never can be wrong ! but I conceive it to mean nothing more than this, that those circumstances which might be necessary to fill up every link of the chain on the part of the plaintiff—those circumstances which must be necessary, in evidence, to support it, though they should not be so specifically alledged as to hold upon a demurrer ; yet if it appears clear and manifest, that the implication of the fact found upon the issue, directly tried by the jury, necessarily supposes those facts, then they shall be supplied : that seems to be the utmost extent to which it can go ; and indeed one of the cases cited by my learned friend (to which I shall presently refer your lordships) seems to state a distinction that will enable me to get rid of most of those authorities.

My learned friend has cited some cases to prove a proposition which I shall not deny, that no precise form of words is necessary to constitute an averment. If a fact is stated, to a common intent, so as to shew the court clearly, that that fact had its existence, which was necessary to support the title of the party who uses it ; that no precise form of words shall be necessary, I am ready to admit.

My learned friend mentioned a case in *roke, Charles*, 497, which was on a promise to permit the party to take away certain furzes growing upon the land, before Michaelmas : the objection was, that it was not averred that the obstruction given to him was before Michaelmas ; the court held that good after verdict, because it must be intended. The defendant had pleaded non-assumpsit ; your lordships know the pleadings in assumpsit are, of all others, the most lax that are known to the law ; and the promise being stated by the plaintiff, that he should permit him to take away before a certain time ; and the defendant having pleaded non-assumpsit, the court held it sufficient ; and they added, as a further reason, that it was not necessary to state the time of the interruption, because it was collateral to the promise.

There is another case for want of averring, that the cattle were *levant and couchant* upon the land : there the prescription being alledged, for cattle *levant and couchant*, and it being stated, that they had been turned in “ for using his right of common aforesaid ;” these words were held to be sufficient to intend, after verdict, that the beasts had been *levant and couchant*, because otherwise they were not agreeable to the prescription found by the jury ; nor could he be using his right of common, because it did not extend to any others.

There are two other cases which appear to me clearly distinguishable in principle, from any application to the present—1 *Modern* 169, and *Cartbew* 7—one of which was a promise to pay fifty shillings, when the party should receive money ; and it was averred, that he had received money, but not stated how much. That was held to be good after verdict.

The other was an action for not weighing at the common beam : the objection was, that he had not averred that they were goods usually sold by weight, or that the defendant had not paid the toll for weighing. This was held good after verdict, by three judges against one.

It appears to me in both these cases, that the objection to the non-averment, was matter not for the plaintiff to have shewn at the outset, but which might have come as a charge on the other side ; for the objection being, that he had not averred he weighed at the common beam, it was matter of discharge for the defendant to have said, “ I did not come to the common beam, because my goods are not weighable ; or you have sustained no injury, because I am exempt from paying toll.”

The distinction, however, is stated in 2 *Strange* 1012, which was cited by my learned friend, in support of his doctrine ; though on the contrary, it seems that the distinction stated there leads me immediately to the answer which I gave to the application of this doctrine, to the present record ; for the whole must depend upon the application—all this general doctrine in the books is of no consequence at all, unless the principle of it can be clearly applied to the record before your lordships.

I need not follow my learned friend through the whole state of the case, which is a long one; it was in a *quare impedit*, and the objection was for want of shewing a seisin by prescription; but the doctrine laid down, upon which I mean to rest my distinction of these cases in general, is this:

"The third and last point is upon the verdict, and that, we all think, has cured the not actually alledging a presentation.

"The common leaning is, that it cures a title defectively set forth, but not a defective title; the words of the statute, 16 and 17 Car. 2, cap. 8, are very strong, and on that act an actual amendment is never made, but the benefit of the act is attained by our overlooking the exception.

"I admit, that if a title is not implicitly found, it will be ill; but, we think, the title being found, which is a seisin, it necessarily follows, that a presentation must have been proved."

Now to adopt that principle which is stated in the book I have just read, it will be only necessary to shew, that the objection here is not of a title defectively set forth, but of want of setting forth *any* title which shall be sufficient to support the defendant in his franchise; in order to that, we must see what is, and what is not, stated upon this plea.

It is stated, that King Charles II. granted letters patent, by which he erected a corporation, for general purposes, in the city of Chester—he incorporated all the citizens and inhabitants of Chester. The plea thus far shews (for we are considering the plea separately, and by itself) that Charles II. was granting a new constitution, for the purposes of general government, to the city of Chester.

Before the defendant can avail himself of any title under such a charter, it most clearly is necessary for him to shew, that that new constitution did take effect.—However, it might be helped by verdict, or assisted by the statute of Jeofails, if he had omitted to set forth certain links in the chain; and to deduce a title regularly down to himself, after that constitution had been once established in the city of Chester—it certainly can never be supplied; unless it is averred in this plea, that that constitution which King Charles meant to grant, *actually did take effect*.

I submit, that there is nothing stated upon this plea; from whence your lordships can collect or infer, that the constitution granted by the charter of Charles II. ever actually took effect; for it is stated, what that constitution is, and that after giving the general power to the corporation to take a grant; and to have a common seal, there shall be a mayor, recorder, and twenty-four aldermen (which shall include the mayor and recorder) forty common-council, two sheriffs, and a number of other officers; with the enumeration of which, it is unnecessary to fatigue your lordships.

Then it is stated, that the King did also appoint, nominate, and constitute, certain persons, by name, to the amount of twenty-four, to be the first and new aldermen of the city aforesaid; and that he did also further grant, that upon the Friday next after the Feast of St. Denis, every year, the mayor, aldermen, and common-council, of the city aforesaid, or the greater part of them, might, without any contradiction, assemble and meet together, in the Common-hall of the city aforesaid, and then might, by scrutiny, nominate and elect, one of the aldermen of the city aforesaid, to be mayor.

Then it proceeds, stating how they shall elect two sheriffs—two coroners—the murrangers—and then it points out the mode of electing the mayor, in case of death or removal, during his year of office—and then the mode of electing aldermen, in case of death or removal—it also appoints the mode of electing common-councilmen, in the case of death or removal; this is all that is stated in the plea, with respect to the actual constitution, under the charter of Charles II. No mode appears upon the record, in which the first mayor, or the first common-council, of the city of Chester, came into existence, unless by the King's nomination; because the charter, in no part of it, as stated upon this record—(and it is agreed by my learned friends on both sides, that we cannot go out of the record)—directs how the first mayor,

mayor, and the first common-council, shall be elected; on the contrary, the King actually names the first aldermen, but does not name the first mayor and common-council; from what, therefore, is it to be collected, that the King did that which is not averred upon this record?

My friends felt themselves so much pressed upon that point, and the difficulty of intending precisely, that the King did nominate a mayor or common-council—that they had recourse to other suppositions, totally foreign, as well to the truth of the case, as to every thing that is stated upon this record.

It is said, that after verdict, every thing is to be intended that must be proved to support that verdict; and, say the gentlemen, “the verdict having found that he was elected in the manner here stated, which is by the major part of the mayor, aldermen, and common-council, cannot be true, unless there was a mayor and common-council.” Supposing even that intendment to be made, it does not go the length necessary to support this plea, because if it should even be intended, that there was, in point of fact, at the time Mr. Amery was elected, a mayor and common-council; as well as aldermen, it does not appear, from any averment in this plea, or from any fact alledged, that these were a mayor and common-council elected under the charter under which he claims—and, indeed, named by the King.

So conscious was Mr. Bower, that it would be too much to presume, from this plea, that the King had actually nominated a mayor and common-council, without any averment that could at all lead to it—that he cites a number of cases to shew, that the King might grant a corporation without naming the first officer—and that he might delegate that right of naming the officer to some other person.

I shall not trouble your lordships with following him through the cases, because I don’t deny the principle; but the necessity of supposing it, proves, in my apprehension, every thing for my argument. What is there in this record which can lead your lordships to that specific supposition more than to any other? Is there so much set forth in this charter (as it is upon this record) that the King *did* delegate that power to any body? any thing to shew who was to nominate, and in what manner to nominate? not one syllable upon this plea which can assist your lordships in making the inference contended for.

Another inference Mr. Bower contended for, was this, “if the King did not name, then,” says he, “the right of electing must devolve on the body corporate, and we must take it that they elected in order to support the verdict.” It seems impossible that intendment could be made, because the body corporate could never elect till all the constituent parts had an existence; this supposition, therefore, presumes itself, and argues completely in a circle;—we must suppose that the mayor, aldermen, and common-council, elected the mayor, aldermen, and council; it is an absurdity in terms, and an argument to which nothing but the necessity of the case could have driven a man of my friend’s superior understanding to resort.

Then what is to guide your lordships in the intendment which you are called upon to make? Supposing, for a moment, that the authorities went the length to support that intendment, what is to shew how, and in what manner, this came into existence?

And, I contend, it is as necessary for him to shew how he derives his title, as to affirm that he has any title at all; all the authorities are so—that it is not sufficient for the defendant to affirm, that he has a title, but that he must state that title upon the record, and state it specifically, so that the judge who reads the record alone, if that record stands uncontradicted, may be able to form an opinion—whether, in point of law, he has made a good title or not.

Then, that being clearly the law, if the defendant was at liberty to call upon a court to make unwarranted intendments, that he might have this, that, or the other title, without any thing upon the record which could lead them to infer the specific title under which he claimed, he might just as well lay aside all the forms of pleading at once; and a much better and shorter way would have been to have alledged, that

that he was duly elected an alderman of Chester—and when the jury had found that, to say, that they had found there were persons capable of electing, and that they had duly elected. There would be an end of all the rules of pleading if it was once contended, that it was sufficient for the defendant to call upon the court to intend a title to support a verdict, without stating specifically what that title was.

Here your lordships will be driven to the necessity (if you are to supply the intendment) of conjecturing what is the title of Mr. Amery; for it being neither stated, that the King did nominate the first mayor and common-council, nor that the King did, what he might do, delegate the right of nomination to any other—it is much less appearing to what others—that right of nomination was delegated; and it being impossible and absurd to suppose, that the first mayor, aldermen, and common-council, could be elected under the charter which was a charter of creation; it follows, of course, that if your lordships were now to turn yourselves to consider what you should intend to supply this defective title, one-half of your lordships might intend one thing, and the other half another: one-half of your lordships might intend, that the King had nominated—the other half, that he had delegated it to somebody else (nobody knows who) to nominate; but it is impossible that you could intend, that they had elected themselves, because that is an absurdity and contradiction in terms.

I believe this will be the first time that ever a court of law has been called upon to make an intendment, to support the title of a defendant, who has not shewn the court what that title is; and, therefore, this objection is not an objection of a title defectively pleaded, but of a title defective in its commencement—the first step of which has never been proved.

If we are to admit, that it is unnecessary to make out the links of the title—if we are to admit, that Mr. Amery need not have averred, that after the mayor, aldermen, and common-council, had come into legal existence, they had, from time to time, legally continued that existence; it surely will be too much to say, that it shall not be incumbent upon Mr. Amery to shew, that the body from whom he derives his right, ever had an actual existence under the charter of Charles II. at all; for if there was any other mayor and common-council in Chester—if there either was a mayor and common-council existing in Chester, antecedent to the charter of Charles II.—or if, subsequent to that charter, the mayor and common-council acquired their existence in any other mode than the mode directed by it, it would follow of course, that Mr. Amery had not made good the title which he had set up—which is under this charter; and your lordships well know that a defendant in quo warranto, cannot resort to any other.

Though your lordships should be able to collect from the whole of this record, or from comparing different parts of the plea, that Mr. Amery might possibly have a title—though you should be inclined even to go so far as, upon the finding, to infer, that he was elected by the major part of certain descriptions of men; yet Mr. Amery having rested his title upon the charter of Charles II. must stand or fall by it; and unless your lordships can see by that plea, that by the authority of that charter, Mr. Amery has a legal title to the office which he holds, he can avail himself of no other ground to support his title.

This doctrine is laid down by the unanimous opinion of the court of King's-bench, when it was as ably filled as it was ever known to be, in the case of the *King v. Leigh*, which I mentioned at the outset. I shall trespass upon your lordships' indulgence, by stating so much of the argument as turned upon this question, a little more particularly:—It was the case of the *King v. John Leigh*, the mayor of *Yarmouth*, in the Isle of Wight, it is in 4 *Burr.* 2146—Mr. Serjeant Davy had moved, in arrest of judgment, on the part of the defendant—cause was shewn by Mr. Serjeant Burland; Mr. Serjeant Davy alledged, that it appeared upon the face of the record, taking in the whole of the pleadings, that the defendant had a good title under the charter.

Here

Here it was averred, and not denied, that it did appear upon the record itself, before the court, that the defendant had a good title; and, therefore, if he could not have judgment for him; Serjeant Davy contended, with a good deal of force, that at least there could be no judgment against him, notwithstanding the finding of the jury against his prescriptive claim; he insisted, that though it had been objected that the defendant had put his defence on a title by prescription; yet it appears upon the whole record, that he had a title; for he has alledged, that he was chosen by a majority of those who assembled upon the charter-day, and the charter appears upon the record; and, upon the construction of it, it was not necessary that he should be chosen by a majority of the whole number of the electors in being.

It was answered by Mr. Serjeant Burland, that the defendant cannot go into the construction of the charter, because upon this record the defendant founds his title upon prescription, and denies the charter; therefore, as the prescriptive title is found against him, he cannot resort to the charter, of which he has denied the very existence.

Mr. Serjeant Davy replied, that the defendant does not found his title upon prescription only, though he acknowledged that he denied the acceptance of a charter; but upon the whole record, it plainly appears, that there was a mode of election directed by the charter, and that he was elected agreeably to the directions of it; and, therefore, there ought to be either an arrest of the judgment, or an award of a re-pleader, on account of the immateriality of the issue.

Lord Mansfield told Mr. Serjeant Davy, "it is too strong for you—you have departed from the title you have set up—and the issues are not immaterial—the judgment must follow the title set up by the defendant against the crown—it cannot be said in general, that the defendant was duly elected."

One of your lordships then at the bar, I observe, was of counsel for the defendant, and pressed upon the court the authority of some of the cases. "Lord Mansfield asked, if they could cite any case where judgment had been refused to the crown upon an information in nature of quo warranto, where the defendant failed in the title he had set up; and it seemed acknowledged, that there was none, at least none were mentioned;" whereupon his lordship proceeded to observe, that "in civil cases, if the plaintiff has no cause of action, he cannot have judgment."

"If any one material issue,"—and this will be a point material for your lordships, in another part of the argument, which I shall have occasion to trouble you shortly with, before I conclude—"If any one material issue" (says the noble lord) "is found for the crown, the crown must have judgment." He then gave reasons why there could not be a re-pleader, and that was the conclusive opinion of the court; and Mr. Justice Yates, who then sat upon the bench, and Mr. Justice Aston, concurred in this opinion; so that your lordships perceive it stands clearly the settled law, in cases of quo warranto, not only that the court cannot intend any thing, but must even shut their eyes against facts appearing upon other parts of the record. Unless the defendant shews a sufficient title upon his plea, he cannot resort to any other, much less can the court intend any other, not specifically alledged, to support his claim.

The intendment, in this case called for, is too uncertain to be applied to the title set up for the defendant, because there is no part of the charter of Charles II. stated upon this record, which enables your lordships to say, that this mayor and common-council ever had an existence, or if they had, that it ought to commence by the charter of Charles II. No intendment that can be made can supply this defect, because the defendant has not stated enough of the charter to shew, that those who elected him ought to have their existence, and those by whom he is stated to be elected—

Lord Chancellor. I believe they never do plead the actual existence of the integral parts that are necessary to an election—nor the particular elections—nor the general continuance.

Mr.

Mr. Serjeant *Adair*. I believe I can safely refer your lordships to all the precedents that are to be found in all the books of entry, when I state this, that they do not state every link of the chain by which the title is deduced, from year to year, and the continuance of the corporate body by successive elections; yet there is no instance but the present, in which they have omitted to state the manner in which the corporate body came into existence.

Lord Chancellor. If they had stated a mayor named by the King, Aldermen (as they have) named by the King, and a common-council named by the King, and the manner of continuing them, it would not have been necessary to have stated, that they were in fact continued, nor that these integral parts existed at the time of the election; but the averment, that he being a common-council-man, was elected by the mayor, aldermen, and common-council, would then have been sufficient.

Mr. Serjeant *Adair*. Perhaps the averment that your lordship has stated, after verdict, would have been sufficient in that case, because if your lordships had seen enough upon the record to satisfy you, that the charter under which he claims title, has clearly taken effect, and has given existence to *all* the constituent parts necessary to perpetuate its own franchises and existence; then those constituent parts having been all brought into existence upon the record, and put into a capacity of acting and continuing themselves; and then it being stated, that this person was one of them, and elected by the majority of them so described—

Lord Chancellor. In point of fact I believe it never is pleaded.

Mr. Serjeant *Adair*. I believe the minute links are not always stated, but the other is never omitted; I need not trouble your lordships why that should be done, because the body is never set in motion if the first effect of the charter is not shewn to have commenced.

There is this further to support the strength of reason against that intendment. Your lordships may intend any thing which may make the verdict a true one—any one thing as well as another, for they have shewn no reason to the contrary; and my learned friend gave your lordships the choice of three or four intendments, some of which I have, I flatter myself, shewn to be impossible; but your lordships might have supposed, in order to support this verdict, that though this charter of Charles II. purports to be a charter of creation, there were a mayor and common-council in Chester before; and that, therefore, the jury have said truly, that Mr. Amery was duly elected by the mayor, aldermen, and common-council—but not the mayor, aldermen, and common-council, created by the charter of Charles II. and my learned friends laboured this point the more, because they were forced to admit, in the most direct terms, that the defendant must abide by the title set forth in his plea.

I will now follow my learned friend in his observations upon the matter of the first replication; and he has confined those observations to such as arise upon the power of motion only. I shall presently shew your lordships, that both my learned friends have wholly omitted to give any answer to other material allegations in that replication; but they have argued first against the construction that we put upon the power of motion reserved in the charter of Charles II. they have also contended, that even if that construction were true, or if upon the construction they themselves contend for, that clause was void, and could not take legal effect, still the consequence would not be, what we contend for, to render the whole letters patent void; and, therefore, these are the points upon which I am principally to address your lordships in this case.

I think it would be most regular to begin with establishing the legal principle upon which your lordships are to form your judgment; and that is, that if the clause in question is contrary to law, and cannot legally take effect, the letters patent are therefore void.

I shall content myself with only reminding your lordships of the authorities that I cited in the outset, to maintain that proposition, and shall add one or two more in reply to the answer that has been attempted to be given to it.

I cited

I cited 1 *Coke* 13, which is a part of the report of the case of *Alton Woods*—I did not cite that, so much for the application of the judgment in the case of *Alton Woods* itself, as for the doctrine laid down by Lord Coke, in the page that I referred your lordships to—which was, that if a condition, expressed in the grant of the King, be void, the grant itself is void also; it was for the purpose of that doctrine, and not for the application of the principle of the judgment in the case of *Alton Woods*, that I troubled your lordships with the quotation. The same doctrine is held in *Hob.* 223—1 *Roll. Abridg.* 164—2 *Inst.* 533.

It will be necessary for me, from the manner in which this has been argued, to state this a little more particularly, for it will apply to both these questions, whether the clause itself is void, and whether it avoids the charter; for these authorities go to shew, that the King cannot, by his letters patent, or by any clause in them, alter the law of the land.

I referred your lordships to certain placita in *Roll's Abridgment*, one or two of which I will state now, and only mention the rest:—The King cannot alter the course of descent by his grant—he cannot make land devisable by his charter—he cannot grant to a man, that he shall hold his land after his entry into religion, because the right of the heir attaches by the common law—he cannot grant to another to hold pleas according to the course of the civil law; for the King cannot alter the law; and such a grant made to the University of Oxford was held void by the then justices of England. The King cannot grant a patent to hold a chancery; for the common law is the inheritance of every man; and the King cannot prejudice any man in his inheritance.

There are a number of others to be found under the same title, in *Bro. Prerog.* stating what things the King can, and what he cannot, do by his prerogative.

There are similar authorities to be found in that part (referred to by my learned friend) of the 17th volume of *Viner's Abridgment*; and the extent of this argument obliges me to follow the example of my learned friend; without troubling your lordships with a minute recapitulation of every case to be found upon the subject, to refer your lordships to places where a number of these cases can be found; those cases which well shew the same point to which I have cited the authority of *Brook's Abridgment*, are in page 124 of that volume of *Viner*. The book itself is of no authority, but your lordships will find the authorities referred to in the margin.

To the same point is 2 *Inst.* 282, which I will not state particularly now, because I shall have occasion to trouble your lordships with reminding you a good deal of the contents of the 2d institute, in the course of the argument; I, therefore, set out with these authorities to shew, that the King cannot make a grant, the operation of which is contrary to the course of the common law, and should alter the law, either in matters of descent, in matter of exercise of franchise, in matter of the proceeding of courts, or by what law they shall administer justice, and there are a variety of other instances put; and further, that if the King annexes to his grant a condition—if the condition is void, the grant must fall with it.

I shall add one more authority, which is that of Lord Mansfield, in the case of the *King v. the corporation of Cambridge*. My learned friend Mr. Bower has chosen to impeach the authority of that case, but with much address: he has impeached it in a disputable part certainly, and in a part for which I did not cite it, but not the doctrine for which I cited it. He calls in question the *dictum*, that a party in possession may partially accept of a charter, and I, with my learned friend, do admit, that doctrine may be doubted; but I cited it for the converse of that proposition which is, not that a charter may be partially accepted, but that a new charter must be rejected or accepted *wholly*.

Now that part of the case my learned friend has admitted to be good law; his objection has even strengthened the authority, because it has expressly stated, that a new charter must be so accepted—but he doubts whether any charter can be *otherwise* accepted; I, therefore, contend, that the King has, in this case, inserted an illegal clause in the nature of condition, upon his grant of a corporation to the citizens

and inhabitants of Chester—that it is such as by law cannot take effect—that the King himself cannot give it effect—that it exceeds his prerogative—that, therefore, the whole charter falls to the ground—the condition being void the charter will be void also; and further, that the citizens and inhabitants of Chester cannot accept that charter without accepting the unlawful condition; for that the charter must be accepted or rejected *in toto*.

Before I can, with any degree of confidence, call upon your lordships to decide this point with me, I should certainly take some notice of the cases cited by my learned friend, in hopes of establishing a contrary position.

My friend refers to *Bacon's Abridgment*, where the rules, with respect to what sort of description shall avoid the King's grant, are stated. My friend, in citing several cases to shew, that there are certain instances in which, though the King is deceived in his grant, the grant shall not be void, has entirely given the go-by to the ground of argument which I used in this case.

I do not (though I might) contend, that the King being essentially mistaken in the law, the grant shall be void; but that it is void because it cannot take effect according to the King's manifest intention; and I believe that will be found a full answer to every one (without exception) of the cases cited by my friend—that not one of them is a case (and I am persuaded none such is to be met with in the books) in which it has been held that the King's grant can enure in part, and be void in part; or that it can take effect contrary to the intention of the royal grantor.

That observation alone will furnish a distinction in all the cases my friend has cited; the description, "*ex certa scientia et mero motu*" can never arise in this case; because it does not depend upon the certain knowledge and mere motion of the King, whether his grant shall extend to alter the law of the kingdom. My objection to this part is, not so much that the King was deceived, as that he was attempting to do what the law would not let him do; that failing in that attempt, the charter which conveys it must fail likewise; for it can never be contended, as against the King, that they should take the grant, though the condition annexed to it could not take effect.

The distinction also, that this principle of the King's grant being void on account of mistake, in matter of fact and matter of law, is applicable only when it will enure to the King's prejudice, will not hold in this case; for if your lordships should take this grant to be good, without the restriction annexed to it by the power of motion, you would make it enure to the King's prejudice, that is to the prejudice of the clear intention of the King's grant; for it would make it a grant in perpetuity of what it is manifest the King only meant to grant during pleasure; therefore, all the cases cited are totally inapplicable to this part of the argument.

It only remains, therefore, for me to shew, that this clause is of such a nature as I have contended will avoid the charter (if I am right in the description of it; that is, that this clause is in itself unlawful and cannot take effect) and then to shew, that if the charter will take effect without it, it will take effect contrary to the meaning and intention of the King.

I shall, therefore, first, contend, notwithstanding it has been laboured so much to establish the contrary, that the true effect of this clause, upon any construction that can be made of it, if it were to take effect at all, must be, to give the King a virtual power of destroying the whole of this corporation.

Now I shall not have occasion to trouble your lordships much with grammatical niceties, for I wish to rest more upon the substance of the thing itself, than upon the grammatical construction; the power is, "to amove one or more" (indefinitely) of the mayor, sheriffs, and every other officer; in short, the enumeration extends to all the officers of the corporation, from the highest to the lowest. Then, say the gentlemen, but this must be so construed as to leave a majority: they call upon your lordships to put a limitation upon the King's grant, contrary to the words of it, which are indefinite and without limit, in order that it may enure—why are your lordships to put this construction? "because," say they, "the meaning of the

the clause shews it ; for the clause that grants a power to amove any one or more, prescribes the mode in which the vacancies made shall be filled up ; and, therefore, it is to be implied, that this power is to be contrued only to such amotions as will leave persons who can fill up such vacancies."

A moment's consideration will enable your lordships to discern the fallacy and inconclusiveness of the argument :—If the King should have reserved a power to amove *all*, then indeed if the construction of the words had been such that we had contended, that the King must amove *all* or none, the answer would have been complete. That cannot be the meaning, because the King has reserved a power for continuing the corporation, which could never attach if he removes the whole ; but when the King has, in the words of it, reserved a power to amove one or more, it was necessary, if the King, who had a power to amove one or more, should think fit, only to exercise the power to the extent of one, two, or three, that a provision should be made for filling the vacancies he should so make. The clause that enables them to continue, by election, certainly affords no answer to that construction ; because that clause has full effect, if the King, in exercising that power, should not think fit to exercise it to the utmost extent to which it could be exercised.

I cannot now call upon my learned friends (for they cannot answer me) but I would call upon your lordships, to say, by what mode of reasoning the operation of this clause can be restrained ? how are your lordships enabled to say, what number the King shall be permitted to remove under this clause ? If the King had issued an order, removing a certain definite number of the aldermen and common-council—removing the mayor, sheriffs, or any others ; if it came in judgment before your lordships, upon what grounds would you be able to decide, whether that power was duly exercised or not ? Would your lordships decide, that if the order contained *too many* it should be void *in toto* ? I will suppose it not to be done by one, but by several orders of amotion—I will suppose twenty-four orders of amotion, all dated upon the same day, to be signified to the twenty-four aldermen of Chester—and I will call upon your lordships to say, if the King has any power of amoving them at all, which of those twenty-four your lordships would retain ? Which thirteen would your lordships say shall continue the existence of the corporation of Chester, and elect the other eleven ? or by what means should your lordships be able to direct which eleven out of these twenty-four should be ousted, and the other thirteen remain ? I conceive it is absolutely impossible ; and that, therefore, this clause does (if it can operate at all) give to the King a virtual and active power of annihilating the corporation which he had created.

If I am right in that construction, I need press your lordships no further in this cause, because I am possessed of the admission of both my learned friends, that in that extent, and upon that construction, it would be unlawful ; and then I will appeal to the authorities I have already cited to shew, that if that be the construction of the power of amotion, it is admitted to me to be void in itself, and then the charter is void ; for it cannot take effect without it. Supposing your lordships to be able to say, how many the King shall amove, and which he shall amove—still, I contend, that this clause would be equally contrary to law ; and I perfectly concur with my honourable friend (who spoke so eloquently upon that part of the case) that it would be infinitely more pernicious in point of effect ; for it would be infinitely less mischievous that the King should reserve a power to destroy a corporation, contrary to the laws of the kingdom in its first constitution, than that your lordships should give perpetuity to that corporation, and yet give the King a power of garbling it at pleasure—of turning out and disfranchising members of that corporation, which he had created with a nominal perpetual succession, without any cause alledged—without any legal process. I need use no arguments to your lordships' enlightened understanding, to prove that it would be infinitely more mischievous—it only remains for me to shew, that it would be equally unlawful.

I must here avail myself of the admission of my learned friends, that if there is matter sufficient to enable your lordships to take judicial notice, that this power

may affect the constitution of parliament it is void and contrary to law. Without descending into the plain that my friends have talked so much about, or departing from the fortrefs of this record, any farther than those out-works of public acts of parliament, and judicial decisions, to which I am entitled to resort, I am at liberty to avail myself of that admission, to shew, that this grant is void. I conceive that every thing which appears, by public act of parliament, is as much within your lordships' knowledge, as the record upon your table; the acts of parliament are not only upon your lordships' table, but engraven in your minds and memories—every thing that is a public law of the kingdom, is within your cognizance, as much as what is written upon the parchment of this record, and more. I would go one step farther; I would venture to state, that your lordships not only *may*, but *ought*, to take notice of the constitution of parliament; your lordships are an high branch of that constitution yourselves—you cannot shut your eyes to the general constitution of the parliament of the kingdom. Even if you had no information from acts of parliament (as in some cases you have not) as to whether counties or boroughs are represented in parliament—I still think, that the knowledge of the constitution of parliament, is a matter within your lordships' breasts, as to knowledge, and within your duty, as to protection.

But if, for a moment, your lordships should think, that you could draw so total a separation between your legislative and judicial character, as the instant that you stepped into the one to forget all the knowledge that you have in the other, still I can bring it home to the judicial knowledge of your lordships, that this will affect the constitution of parliament; for your lordships are bound by an act of parliament of Harry VIII. to know, that the county palatine of Chester, and the county of the city of Chester, do now send representatives to parliament—that is a knowledge which your lordships possess judicially, and cannot forget;—your lordships are bound by the same to know, that the writs are to be directed to the chamberlain of Chester, and that by him the precept is to be issued under the seal of the county palatine, to the sheriffs of the city of Chester.

Your lordships, therefore, know from legislative authority, that the sheriffs of Chester are the returning officers of members to serve in Parliament: And then shall it be borne for a moment (even if my learned friends had not made that admission which their good sense and knowledge of the constitution extorted from them)—shall it be borne for a moment, that a clause which reserves a power to the crown, to turn out *ad libitum*, without any ground alledged, the returning officer of members to Parliament, shall not vitiate a charter?

It would be an imputation upon your lordships to think it necessary to argue it for a moment; it is sufficient to state it, and to refer your lordships to authorities that cannot err. I need not follow the arguments of my ingenious friend, who went over this ground so much better before me, shewing that the journals of the house are ingrafted into the act of parliament; for which I have the authority of that great and noble lord who so long adorned the King's-bench. But if there is not a power of amoving another individual reserved, it is enough that the King reserves a power of amoving these returning officers. That is enough to consign this charter, with all the rest of Charles II.'s charters, into that oblivion which alone can rescue them from execration.

I need not dwell longer upon this part of the case. That a corporation, for the general government of a place, granted to the citizens and inhabitants, and establishing a mayor, aldermen, and common-council, with power to make bye-laws—with power of magistracy—with all the powers incident to government, must have great weight and sway in the election of members for that place (let who will be the members) is a proposition too clear to be dwelt upon in argument; but I need not pray that in aid, because I conceive the ground I have already stated, to be so perfectly decisive, that no mode of argument can get over it. Besides, I conceive I am warranted by the authority of *Warren's case* (which was originally cited) to contend,

tend, that an alderman has a freehold in his office—I mean an alderman generally and indefinitely appointed or elected.

I do not thereby deny, what has been argued on the other side, that the King has a power to direct the annual election of officers of corporations—but I deny, that he has a power (let their election be when it may) to turn them out without cause, till the time for the next election shall arrive—I deny that he has a power to constitute a corporation in perpetuity, and insert in it such a garbling clause as shall make all the members of it hold at his pleasure; I, therefore, contend, that there is no construction, that can be received, of the clause in question, upon which your lordships, as guardians of the law of England, can permit it to take effect.

I contend, that if your lordships cannot permit it to take effect, by all the rules of construction the charter must fall with it; because there cannot be the least doubt that the King meant to reserve that power; there cannot be the least doubt that it was his intention to garble the corporation of Chester—there cannot be the least doubt that he did not mean to give the officers of the corporation a perpetuity independent of himself; and your lordships, therefore, by giving effect to the charter, without this clause, would grant a corporation in perpetuity, with their officers in perpetual succession, independent of the King, when the King meant to grant no such thing.

If King Charles were to be raised from the dead, and asked, at this moment, whether he would grant to the citizens and inhabitants of Chester the charter without the clause in question? he would say, “No! my object was to create a corporation of which I should have the garbling—a corporation which should be for ever in my power—which should be the instrument of all my corrupt and ambitious views—and without that clause they should not have had it if they would.”

That is the answer that would be given; and your lordships have heard already, from authority not disputed, that they cannot accept it without accepting the condition annexed.

The next thing I observe in the argument, which it is my duty to answer, is respecting another allegation in the same replication, that the mayor, aldermen, and common-council, of the city of Chester, however constituted, whether lawfully or unlawfully, were in fact removed; and there I must again put the dilemma with which my learned friend near me was so facetious in the beginning of his argument, and I trust that the horns of that dilemma will not be quite so harmless as he seemed to flatter himself they were.

If the power of amotion is not unlawful, I have stated that there is no construction which can restrain the effect of it; but I am not much disposed to dwell upon an argument so utterly contrary to my own opinion and feelings upon the case. I think the grant of the power, and the exercise of it, equally unlawful; they differed only in the motive; the motive of the one was arbitrary and illegal, that of the other fair, and in its consequences, for the benefit of the public, but *both*, I insist, unlawful. If the order of amotion by King James was unlawful, it could have no effect or operation; it could not remove the corporate officers of Chester if they once had a legal existence under the charter of Charles II.

I beg leave to say, that all Mr. Bower's arguments, with respect to the *de facto* operation (if I may so call it) of the judgment *quousque* will apply with tenfold force in this part of my argument; for we have no occasion to pray the aid of any statute, or any averments; because I conceive that it is distinctly averred as a matter of fact in this replication, that, whether right or wrong, these men were actually removed.

I will remind your lordships of the mode in which that is stated:—It is stated, that the persons therein named were all the aldermen, and all the common-council; and that the King made an order in council for removing them all, and that there were no others then in Chester; he ordered, that they should be, and they were thereby, removed—those are certainly only the words of the order, saying, “they shall be and are hereby removed.” I, therefore, do not contend, that those words contain

contain an averment of the fact of their amotion ; but it goes on to say, that " afterward, to wit, on the twelfth of August, in the said year 1688, the said order in council, under the seal of the said privy council, was signified to them (stating their names) and thereby they and each of them, severally and respectively, became and were amoved from their respective offices and places of aldermen and common-council-men beforementioned."

Here is a distinct averment of fact, and fact only ; it is for your lordships to decide, whether this order was lawful or not ; here is a distinct averment that it was made—a distinct averment that it was signified—a distinct averment that it was obeyed ; for it is stated, not only that they became thereby, but that they *were* amoved.

My learned friend suggested a different mode, in which he said this might be alledged ; I might suggest a dozen different modes and forms of words in which it might be alledged—but I cannot bring my mind to alledge a clearer averment, than saying, *they were amoved* ; and it cannot be considered merely as drawing the inference, for that inference of law was completely drawn before. The terms of the order were, that they were thereby amoved ; then it is added, that that order was signified to them, and that " thereby they became"—(surely even there is a sufficient averment of the legal effect)—then the addition, that " they were amoved," means nothing, or it means the fact, that it was signified, and they were amoved—(whether lawfully and rightly or not I shall shew your lordships hereafter is immaterial)—then follows the legal conclusion drawn, " that by their being amoved," who were the whole body who had power to elect, " thereby the power in the last-mentioned letters patent, to elect aldermen, ceased and determined ;" that is the legal inference—the fact is, there were no other mayor, aldermen, and common-council, in Chester but these—these were by a certain order amoved—either lawfully or unlawfully—but being in fact amoved, thereby the power of election ceased and determined ; it did not cease and determine because it was unlawful, but because there was nobody to exercise it—it determined by the natural death of the parties ; and if, instead of the signification of the order of council, James II. had sent a battalion of the guards to Chester to remove these gentlemen, and they had come into the Town-house and turned them out, and said, " you shall never come here again," and they did not come again, but were thereby amoved, the conclusion of law would have been, that they *were* amoved, and the power of election ceased ; so it would have been if he had cut all their throats. Therefore, it does not seem material upon this record to inquire into the legality either of the reservation or the exercise of the power of amotion ; it is enough for me that it *was exercised in fact* ; that it is averred that that exercise was effectual—that it produced its purpose—that the only persons who could elect under the charter, were amoved. Then the defendant has no where brought them into existence again ; but on the contrary, subsequent matter is stated, from whence your lordships, if called upon, are forced to infer, by irresistible conclusion, that they ceased to exist, and continued in that state of political nonentity ; because your lordships find the next fact stated is, " that other persons did act in their places"—that the King restored certain other persons who had, by certain other means (whether legal or illegal in this part of the argument don't import) been before removed, that they again took upon them their offices, and the charter which authorized them to do so, was accepted.

Lord Chancellor. There are are two different replications I take it.

Mr. Serjeant Adair. The acceptance of the charter of restitution is in the second replication, but though the defendant is confined to his plea, the prosecutor, your lordship knows, may avail himself of the whole record.

Lord Chancellor. He cannot make one replication good by another, I am afraid.

Mr. Serjeant Adair. But if your lordships see upon the whole of the record, that the plaintiff is entitled to judgment, we are not to stand by our own replication if it is mispleaded. If facts are found upon this record which shew your lordships

ships that the defendant has no title to maintain his franchise, we shall, under the authority of all the cases, be entitled to your lordships' judgment.

I am not called upon in this part of the argument to pray that in aid; my argument is complete without it; I contend, that by the actual motion, as well as by the actual death, of the members, the power of election ceased, unless the defendant has again brought them into existence.

These are all the points that have been raised by my learned friend upon the first replication.

The second replication leads us into an inquiry of considerable importance and extent.

In the questions raised upon the second replication, almost the whole law and constitution of corporations are involved: I shall endeavour to follow my learned friend's argument as closely as I can; and upon the general principle that corporations cannot be dissolved by any judgment, I shall not trouble your lordships with repeating that head of argument, which it is not necessary for me to maintain in its full extent, but shall claim your lordships' recollection. My learned friend says, and says truly, it is a strong proposition; yet I am in your lordships' recollection, that I have cited authorities equally strong in the support of it—being a strong proposition, I thought myself right to cite strong authorities for it, and when your lordships come to revise those authorities, you will find them equal to the support of the proposition in that extent.

Though I lay claim to the benefit of these authorities—and though no case of a judgment whereby a corporation has been wholly annihilated and ceased to exist, has yet been found, I am not at all called upon to go all that length in support of my argument upon this record; because, whether a surrender might dissolve a corporation or not, is not the question here, for there has been no surrender—whether the King, by his prerogative, might dissolve them or not, is not the question here, though that would hardly be made a question in these times; nor is it a question whether a court of competent jurisdiction, by a final judgment of ouster, might not dissolve this corporation, because there is neither a final judgment nor a judgment of ouster upon this record; but the only point necessary for me to maintain to entitle me to your lordships' judgment is this, that by what is upon the record it appears, that the corporation was not in a state to be dissolved, or to be conveyed away and granted to others.

Mr. Bower has attempted, with great ingenuity, to argue this point upon the effect of the judgment *quousque*, and, I think, except in one or two parts of his argument where he has slightly touched the other ground, it turns wholly upon confounding the effects of a final and of a *quousque* judgment; and, I believe, when your lordships come to consider that part of his argument, you will find I am justified in that assertion.

But, my lords, in turning over my note of my learned friend's argument, with respect to the second replication, I find, that I have omitted (as he had omitted in its regular place) to take notice of an objection which has been raised to the allegation of the manner in which the charter of Henry VII. was granted.

This has been urged at considerable length, and with much earnestness, by my learned friends, as if to shew, that when we argue the charter of Charles II. to be void, they will at least be even with us, and prove the charter of Henry VII. to be void also.

If we are right in the proposition, that the charter of Charles II. is void, I believe we might safely concede to them the other; for it appears, their title will not be the better, for want of any valid charter subsisting in Chester; but there is only one point of view in which that objection can be material, namely, supposing the charter of Charles II. not to be avoided by any fact contained in itself—and supposing the members of the corporation, created by it, not to have been *de facto* removed; then it may become a material consideration, whether the matter in the

second

second replication does supersede that title (if I may so say) which the defendant would otherwise have; and it is contended, that the charter of Henry VII. could not stand in the way of the grant from Charles II. because it was itself void, as being under a seal which was not competent to convey that franchise.

Here I feel myself so strong in authorities, that I have no anxiety as to the event of your lordships' judgment upon this question; I will first clear the case by stating how far I admit the doctrine of my learned friends. I admit their general principle, that a corporation cannot be granted by the King otherwise than under the great seal; I admit it, however, with one exception, and I can shew that one exception to be the case of a county palatine, by authorities, I think, too strong to be resisted.

The propositions I have to maintain upon this part of the argument are these—that the seal of a county palatine is sufficient to create a corporation within the county palatine—that at the time of this grant, the county palatine of Chester existed, and was not merged in the crown (as has been argued)—and that there is upon this record, compared with public acts of parliament, to shew, beyond a doubt, that such was the state of this charter.

First—With respect to a county palatine, the nature of that franchise is material to be considered; and your lordships well know, that it is the highest of all franchises which a King can grant, or a subject receive; in truth, it sets the subject upon a level with the King, except as to his title and his crown alone. "*Solo dīademate dispar*" is the language of one of the books upon the subject—it makes him a lesser King in fact, with a different title, and subject only in the last resort to that King from whom he derives his authority.

The nature of a county palatine is stated in several books of high authority—Lord Coke, in 4 *Institute* 204, speaking of the duchy and county palatine of Lancaster (of which he treats together) states the nature of a county palatine; it is called *comitatus palatinus*, a county palatine, not a *comite*, in respect of the dignity of an earl, but a *comitatu*, and a *palatio regis*, because the owner thereof, be he duke or earl, hath, in that county, *jura regalia* as fully as the King himself hath in his palace—(there can hardly be stronger words)—from whence all justice, honours, dignities, franchises, and privileges, as from the fountain at the first, flow. Neither by this charter was the duke of Lancaster created count palatine, but the county was made a county palatine; the power and authority of those that had county palatines was king-like, for they might pardon treasons, murders, felonies, and outlawries thereupon—they might also make justices of eyre, justices of assize, of gaol delivery, and of the peace.

So that it once for all answers the argument of my learned friend Mr. Bower, who supposes that justices of the peace must be made under the great seal; for here is the express authority of Lord Coke, that the count palatine hath an authority to make justices of peace, if he so pleased, within his county palatine. And the next instance Lord Coke gives of the pre-eminence of that franchise shews it, for all original and judicial writs, and all manner of treasons and felony, and the process thereupon, were made in the name of the persons having such county palatine; and in every writ and indictment within any county palatine, it was supposed to be *contra pacem* of him that had the county palatine; so that to be sure, justices of the peace were to be created under the seal of the county palatine, because the justices were assigned, not to keep the King's peace, but the peace of the county palatine.

I need not trouble your lordships with reading all the words—there is nothing will weaken the strength of them in any part, as your lordships will find by consulting the book itself; but it appears in the opinion of this great and venerable oracle of the law, that whoever was seized of the county palatine (for he expressly says it was not personal) has, in right of that county palatine, *jura regalia*, in every respect as much as the King himself—subject (and that is the only thing reserved) to writ of error to the King, in the last resort.

There

There is, however, in speaking of the duchy and the county palatine of Lancaster, a distinction between them which transient observers are apt to confound; there is a material observation pointed out by Lord Coke 206:—"Lands," says he, "within the county palatine, should pass by the duke's charter, without livery of seisin or attornment." There is another badge of royal prerogative; for your lordships know the King alone, in those times of feudal tenure, could grant and pass by a grant without livery of seisin or attornment. "But of lands," and here he states a distinction—"But of lands, parcel of a manor annexed to the duchy, without the county palatine, there ought to be livery of seisin, and attornment of tenants, and in the same degree is it in the King's case; the reason hereof is, for that the county palatine of Lancaster was a county palatine, and the duke there had *jura regalia*."

So that there is a manifest and clear distinction, and which I hope your lordships will never lose sight of in this part of the argument, between the *duchy* of Lancaster and the *county palatine* of Lancaster. The duke has pre-eminence in right of his duchy of Lancaster, but still the county palatine was higher, and alone retained that badge of distinction of royal prerogative which was not in the hands of those who were out of the county palatine; that distinction is followed up in other cases I shall have the honour to state to your lordships.

There is another expression of Lord Coke's, page 209, in the same book, which is too material to be passed over; and the more so, because it refers to (I may almost say) the case that has been cited on the other side, on this subject, which is that reported at length in *Plowden*, with regard to all the judges, and some of the King's serjeants. "The resolution of all the judges concerning leases made by the Chancellor of the Duchy-chamber, was, that if the lease, either in possession or reversion, be made under the duchy seal, the lease is good, although in truth the Chancellor made it, and put to it the seal of the duchy; for such leases under the duchy seal, or under the seal of the county palatine, of lands within the same, are of as great force as of lands of the crown, under the great seal."

So that as far as respects the grant of lands, your lordships see that it is stated by Lord Coke, and stated as the opinion of all those judges upon whose opinion my learned friend so much relied, that the grant of lands has as great effect under the seal of the duchy, as of lands in England under the great seal.

Lord Coke, in 210, recognizes the distinction again; he states the general conclusion of law—"so as the law concerning this point is, that for grants of reversions, by letters patent, under the King's seal of the duchy of Lancaster, there must be attornment for lands out of the county palatine, to make a privity, as in case of a fine for the action of waste or distress; but of lands within the county palatine, the reversions pass by letters patent, under the seal of the county palatine, both for the estate, and for the privity of the action and of the distress."

So that from all these authorities it is plainly the opinion of Lord Coke, that the county palatine is of so high a nature, that the lands in it pass without those ceremonies which are necessary to pass the lands of any other royal franchise than that of a county palatine. These authorities are all taken from that chapter of the fourth Institute, which treats expressly of the duchy and county palatine of Lancaster.

It is observable, the very next chapter of Lord Coke treats expressly of the county palatine of Chester; and the first thing to which I shall call your lordships' attention is, that there is in Lord Coke's *Institutes*, such a chapter at all; because at the time that Lord Coke wrote, the county palatine of Chester was in the hands of the crown, as much as in the reign of Henry VIII. or at this day. If, therefore, the doctrine which my learned friend near me contended for so strenuously, that the county palatine was merged in the general rights of the crown, was true, your lordships would have found no such thing in Coke's *Institutes*, as a chapter concerning the rights of the county palatine of Chester—it would have been a chapter of mere antiquity, but not of law; Lord Coke would have contented himself with saying,

that such a thing had once been, but for a century back had merged in the crown, and ceased to exist.

So that if legal argument could be a subject-matter of demonstration, I could pledge myself to prove, that the regal rights of the county palatine are not merged, but exist in full, except so far as they are altered by the force of any acts of parliament.

Lord Coke says, it is the highest county palatine, and the most antient, in this kingdom—that it was granted to Hugh Lupus, by Willlliam the Conqueror; “this is the most antient and most honourable county palatine remaining in England at this day” (not that it *was*, but that it *is*) “with which dignity the King’s eldest son hath been of long time honoured.”

“By this general grant, this Hugh Earl of Chester had *jura regalia*, within the county, and consequently had *comitatum palatinum* without any express words thereof.”

“And by force thereof, as incident to the county palatine, he created eight Cheshire barons, which was the first visible mark of a county palatine.” Now the power of creating the degree of baron, of honour and nobility, within the county palatine, as the King might do within the kingdom, is, of all other franchises that can be exercised, the most important.

Your lordships will find, that in King’s Vale Royal, and other books respecting the antiquities of the county of Chester, there are divers instances stated of the creation of these barons, by the earls of Chester, from time to time; and your lordships will find so far back as by Edward I. in the 49 Henry III. his father (still living) a confirmation of the grant of the earls of Chester, to the barons of the county palatine of Chester, under his seal, which seal could be no other, as your lordships well know, than the seal of the county palatine; because Henry III. being then living, Edward could not have the use of the great seal.

I will not fatigue your lordships more than I can avoid by entering further into this. Your lordships will find Lord Coke goes at large into this doctrine, from the first page I cited (204) treating of the duchy and county palatine of Lancaster, through the two succeeding chapters to page 220, and of the county palatine of Chester and county palatine of Durham; in all of which similar doctrines are to be met with.

I will not tire your lordships with repeating the particular description of the height of this franchise, which is also to be met with in *Davis’s* reports, which your lordships know are of very high authority in the few cases they contain: there are none more learned, perhaps. There your lordships will find, in 61 and the following pages, the high franchises and jurisdiction of a county palatine laid down in terms exactly uniform with the doctrine of Lord Coke, which I have stated.

As I will save your lordships the time and trouble of hearing those authorities, which are little more than a repetition and recognition of those I have stated from Lord Coke, you will forgive me in mentioning particularly two others, which it is the more necessary to particularize, because they are directly and expressly in point to the question now before your lordships.

The first is from 2 *Lutwyche*, 1237. I before mentioned, and referred your lordships to, this authority; but as this point of the argument has been so earnestly pressed, and much rested upon, since I troubled your lordships last, I will beg to repeat what is said in that book; because it strikes me as directly in point to the present question, which I take to be, Whether the king can create a corporation under the seal of the county palatine?

Lord Chancellor. I take the only point of the argument to be, Whether the court can take judicial notice of that authority, without its being averred?

Mr. Serjeant Adair. If I am possessed of your lordships’ opinion upon that, I will trouble you then with only one more authority, to shew that, in this very point, the doctrine which was laid down in *Lutwyche*, which I before cited, is recognized in a modern case, and the distinction expressly stated is, that in such part of the duchy

duchy of Lancaster as is not a county palatine, the king cannot create a corporation, except by the great seal of England; but *otherwise* with respect to the county palatine. It is in 3 *Salkeld* 111—"There is a seal for the county palatine, and another for the duchy; that is, such lands as lie out of the county palatine, and yet are part of the duchy; for such there are, and the dukes of Lancaster held them, but not as counts palatine, for they had not *jura regalia* over them. It is for this reason that the king may make a corporation by the seal of the county palatine, within the county palatine; for so might the count palatine himself, as having *jura regalia*."

This last authority, therefore, is express to these two points:—First, That a corporation may be created by the seal of the county palatine, by the count palatine himself. In the next place, That it may be created by the king, during such time as the county palatine is in him: And therefore it is clear the county palatine is not merged in the crown.

Then the question is, Whether it appears upon this record, that there is a county palatine of Chester, and that the county palatine of Chester was in the king, at the time of this grant? Now your lordships' attention to the record will put that out of all doubt; the first statement that meets my eye goes a great way towards establishing my proposition; for it is, "that King Henry VII. by his letters patent, under the great seal of his county palatine of Chester," &c.

Is it possible that your lordships can now shut your eyes and doubt whether there is a county palatine of Chester at all? and doubt whether that county palatine was in the King, when we have expressly stated it, and it is not denied? We have expressly stated, that the King did grant this under the seal of his county palatine of Chester. Then I don't see upon what ground I need go farther; but it is said, that the chamberlain must sue out process under the seal of the county palatine; throughout the whole of this replication, the county of Chester is distinctly treated as the county palatine of Chester, vested in the King. Besides, your lordships are called upon by the highest authorities, to recognize the county palatine of Chester, and the existence of it in the King.

Your lordships seem correctly to have taken the effect of an act of parliament of Richard II. that has already been alluded to by a learned and noble lord, which was, not to shew that it had any operation now upon the county palatine of Chester, to which the repeal would undoubtedly have been an answer; but it is a recognition of parliament, that the county palatine of Chester then existed as a county palatine, had its *jura regalia* and ancient usage, and the effect of that repeal is, that it shall no longer be a principality, but a county palatine, as before.

The next act my learned friend (Mr. Bower) has taken notice of, is the 27 *Hen. VIII. cap. 5*, for making justices of peace in Chester and Wales: that act speaks of the county palatine of Chester also; it is, therefore, a legislative declaration, that the county palatine of Chester had existed, and existed in the crown too. It enables the chancellor of England to appoint justices of peace, of gaol delivery, &c. under the great seal.

Now my learned friend was wrong in the application of this act. This act was not necessary to enable the King to make justices of the peace under the seal of the county palatine, but under the great seal. We have the authority of Lord Coke, that, anterior to this act, the count palatine could make justices of the peace under his seal. We have the authority of all the books, that he could and did make justices of gaol-delivery under the seal of the county palatine; and therefore the operation of this act is, to shew that without it they must have been made under the seal of the county palatine. The doubt was, not whether he could make them under the seal of the county palatine, but whether he could make them under any other seal; and this act is to remove that doubt, and put the nomination in the chancellor of England, under the great seal.

The 32 *Hen. VIII. cap. 43*, is made for regulating the holding of county courts in the county palatine of Chester; it is sufficient to state to your lordships, that the

whole of that act, which contains nothing material in the enacting part of it to this point, is a strong recognition of the existence of the county palatine, and its existence in the crown.

The 33d *Hen. VIII. cap. 13*, respects the holding county courts in the county palatine. There is a remarkable clause, which directs the coroner of the county to be elected by virtue of the king's writ, *De coronatore eligendo*, to be awarded out of the exchequer of Chester. Now your lordships know that the writ, *De coronatore eligendo*, is a prerogative writ; and therefore, though the crown had been enabled by former statutes to make justices of the peace, and others, under the great seal, yet still, to shew that the county palatine existed in the king, that the king might not forget that he had the county palatine of Chester, that he might not fancy he was to confound that with what he held *de jure coronæ*, in the rest of the kingdom of England, and that he might not do *every thing* under the great seal, the act directs that writ to issue under the seal of the county palatine of Chester.

The 1st *Edw. 6. cap. 10*, respecting exigents and proclamations in Wales and Chester, recites, "that the counties palatine of Chester, and of the city of Chester, be antient and several counties palatine of themselves; in all which said counties the king's writ hath not, nor yet doth, run." So that though these counties palatine were united to the crown of England, they still retained their several jurisdictions, and are recognized so to do by this act.

The 3d *Edw. 6.* for levying fines in the county of Chester, calls it in express terms, "the king's county palatine of Chester;" so that it recognizes the existence of it, and that in the hands of the king.

The 43d *Eliz.* for the same purpose of levying fines, refers to the very charter in question before your lordships, and speaks of the city of Chester, with the suburbs and hamlets thereof, and all the land within the precinct and circuit of the said city, suburbs, and hamlets, as being long before, by our late sovereign lord of famous memory, King Henry VII. by his highness's letters patent, bearing date at Chester, the sixth day of April, in the one and twentieth year of his reign, divided, exempted, and in all things separated, from the said county of Chester."

Now is it possible for your lordships to shut your eyes against this express recognition of this charter? Instead of doing as the courts have always considered themselves bound to do, making intendments to support the title of the crown, against the allegation of the usurpation of franchise; are your lordships now called upon, for the first time, to make the unnatural intendment, that there are *two* charters of Henry VII. of that date? when it appears clearly upon this record, that the charter of Henry VII. bears date the sixth of April, in the twenty-first year of his reign, divides the city of Chester from the county palatine of Chester—is dated at Chester, and stated to be given under his county palatine seal.

Is it possible for your lordships to suppose, that the act I have been reading means some other charter, when it states the date of the charter, and every thing it can do to identify it? when it states the subject matter of the charter, and that, *de facto*, the city of Chester was separated from the county palatine, by this very charter? Or can it be contended, that this is not a subsisting charter—a charter granted by the King in right of his county palatine of Chester, and duly granted under his county palatine seal? The legislative authorities, however, do not stop here; I shall trespass upon your lordship's indulgence by only citing two more, which you will find to be extremely material indeed.

The first in order of time is, 23 *Henry VIII. cap. 5*, which is the act of parliament for the establishment of the commission of sewers; and your lordships will find the parts I apply to this argument, in the eighteenth and twentieth sections of that act; and it is extremely remarkable indeed, and one of the most decisive things that may have yet been suggested to your lordships' attention on this part of the question; for having given general directions for the mode of issuing and making out the commission of sewers throughout England and other places, it then states what shall be done under this act in the county palatine of Chester. When the

the general provision had been made for the mode of issuing commissions, under the great seal, throughout the kingdom, why was it necessary to say a word about this county palatine of Chester, unless at the time it was a subsisting county palatine, with all its *jura regalia* in the hands of the crown? But it does not cease with that observation; it directs, that two commissions of sewers be made out, one under the great seal, and another under the seal of the county palatine; and (which is the most material of all) the officers of the county palatine are directed, on sight of the commission under the great seal, to make out another of the same tenor under the seal of the county palatine.

Now the conclusion I draw from this act is, in my imagination, not to be resisted; it goes farther than I contend for; it goes to this, that, except in cases where it is otherwise directed by act of parliament, the great seal can have no operation in the county palatine; except, for instance, in the cases provided for in the act of Hen. VIII. where authority is granted to make certain appointments under the great seal, and that they would not otherwise operate in the county palatine of Chester; for if the commission, under the great seal, was available in the county palatine of Chester, they had nothing to do but to send it down there as well as to the county of Southampton, Bedford, or any other county in the kingdom. But though it is not left to the palatine officers of Chester to chuse and nominate commissioners—though it is not permitted them to alter a word of the tenor of the commission—yet the act directs that they shall make another under the seal of the county palatine;—Why so if the great seal was available? What occasion for that circuitry? Why send an instrument under the great seal to serve merely as a rough draught? That would be putting those who held your lordship's high situation in former times, in the mere situation of draughtsmen, who were to send down a copy of this commission, unless there was some good legislative reason; that reason was, that parliament thought it proper to place the power of appointing the commissioners, and of directing the mode of the commission, in the hands of the chancellor of England; but that alone was not sufficient to give it effect and operation on the county palatine; it was to go with the authenticity of the great seal upon it, which parliament directed to be the authority for the officer of the county palatine to make out another commission, which should operate in the county palatine.

It seems to me, therefore, that this act shews, beyond a doubt, not only that we have done right to state this charter of Henry VII. as under the seal of his county palatine, but that we should have done wrong if we had stated it to be under the great seal.

There is another observation for which I thank my learned friend, who, if he had the opportunity of making it himself, would do it so much better, that the statute of Henry VIII. for appointing justices of the peace, and justices of gaol delivery, under the great seal, in the county palatine of Chester, having said nothing about the sheriff, the sheriff is appointed under the seal of the county palatine, to this day.

I shall trouble your lordships now with but one more act of parliament, and it is a very singular one, and I am the rather called to obtrude it upon your notice, because I think you would not be apt to look for it in the place where I have found it; for it is an act for stopping the spreading of a distemper among the *borned cattle*!—the statute of the 26 George II. *cap. 34, sec. 4*; that act takes notice of the alteration in the mode of our computation in the calendar, or what is called the alteration of the style, and mentions an inconvenience which might arise from that alteration, in the city of Chester.

It recites the annual meeting for the election of mayor and other officers of Chester:—"Whereas, within the city of Chester, the usual and accustomed time of the annual meeting and assembly" (not of the mayor, aldermen, and common-council, but) "of the citizens of the said city, for the election of the mayor, sheriffs, treasurers, coroners, and leave-lookers, of the same city, hath been, on the Friday next after the Feast-day of St. Dennis, yearly; and whereas by an act of

of parliament for regulating the commencement of the year, and for correcting the calendar now in use, it was, amongst other things, enacted, that all meetings and assemblies of any bodies politic or corporate, either for the election of any officers or members thereof, or for any such officers entering upon the execution of their respective offices, or for any other purpose whatever—which, by any law, statute, charter, custom, or usage within this kingdom, were to be holden and kept on any fixed or certain day of any month, should, from and after the second day of September, 1752, be holden or kept upon, or according to the same respective nominal days and times whereon, or according to which, the same were at the time of making the said act to be holden; and whereas by the said recited act it was further enacted, that the holding and keeping of all markets, fairs, and marts, whether for the sale of goods or cattle, or for the hiring of servants; or for any other purpose, which are either fixed to certain nominal days in the month, or depending upon the beginning or any certain day of any month, and all courts incident or belonging to, or usually holden and kept with, any such fairs or marts, fixed to such certain times as aforesaid, should not, from the said second day of September, 1752, be continued upon or according to the nominal days of the month, or the time of the beginning of any month, to be computed according to the New Calendar, in the said recited act mentioned; but that from and after the said second day of September, all such markets, fairs, and marts as aforesaid, and all courts incident or belonging thereto, should be holden or kept upon, or according to the same natural days upon or according to which the same should have been so kept or holden in case the said recited act had not been made; that is to say, eleven days later than the same would have happened according to the nominal days of the said new computation of time by which the commencement of each month, and the nominal days thereof, are anticipated and brought forward by the space of eleven days, any thing in the said recited act contained to the contrary thereof in any wise notwithstanding. And whereas before the making of the said recited act, one of the annual fairs within the said city, commonly called Michaelmas Fair, was begun to be holden and kept yearly on the 29th day of September, and continued for several days afterwards; and pursuant to the directions of the said recited act, the same fair will hereafter begin to be holden and kept on the tenth day of October yearly, which is the day next after the feast of Saint Dennis; by which means the Friday next after the said feast will always hereafter happen during the time of holding and keeping the said fair, and, therefore, it would be very inconvenient to the" (not the *mayor and aldermen, and common council*, but to the) "*citizens of the said city of Chester, if the annual meeting and assembly of the said citizens, for the election of the mayor, and the aforesaid other annual officers of the said city, should continue to be holden on the Friday next after the said feast of St. Dennis;*"—then it makes a provision for remedying this inconvenience.

Can your lordships close your eyes here and forget, that by the charter of Charles II. the *citizens* of Chester had no business to assemble for the election of a mayor—for the election of sheriffs—for the election of coroners—for the election of murengers—leavelookers—or any of the annual officers? By that charter the *citizens* had no right to meet upon that day; the act, therefore, is nugatory; it recites a falsehood, for it recites, that the citizens had been used and accustomed to meet for the election of a mayor and other officers, when, by the charter Mr. Amery sets up, they never had met for any such purpose—they had nothing to do with the election of mayor.

Lord Chancellor. You mean upon this to argue, that the house ought to take judicial notice that there is no such charter of Charles II. and that there is such a charter as Henry VII.

Mr. Serjeant Adair. It is very strong judicial evidence when I find it a recital in an act of parliament.

Lord Chancellor. There is no medium between judicial notice and nothing.

Mr. Serjeant Adair. I conceive your lordships are to take judicial notice of acts of parliament.

Lord

Lord Chancellor. I don't mean to deny your argument, but only to know how ar you carry it.

Mr. Serjeant Adair. I therefore think that I have proved—I almost flatter myself that I have kept my word, and demonstrated, that the county palatine of Chester exists at this day, and did exist in the reign of Henry VII. as a royal franchise in the hands of the crown, not merged in the crown, but to be conducted according to the rules and customs of the county palatine, under the seal of the county palatine, in all cases except where acts of parliament otherwise direct. Then I think this objection, which my learned friends have laboured very much, must fall to the ground; they were right in so doing, because undoubtedly if they are not founded in that part of the argument, they have nothing to depend upon but the judgment *quousque*.

They argued it ably, but I trust the weight of authorities is so great, that they will have done it ineffectually. I shall, therefore, pass over, with a word merely, what they have said with respect to the charter of confirmation of Elizabeth:—if it could be contended under all that appears to your lordships upon this record, and from the general laws of the kingdom, that the charter of Henry VII. was a mere nullity, I agree with them that that which is originally void cannot be confirmed, and that if it is not a charter of grant, as well as of confirmation, it could have no effect as a charter of confirmation, supposing the former to be absolutely void.

They say we have not pleaded it as a charter of grant. I apprehend that we have, in this way—for we have stated a grant contained in that charter which is not in the charter of Henry VII. a new grant is expressly stated upon this record, and we are not under the difficulty that the defendant would be in this case; for though it is holden that the defendant cannot plead a charter both as a grant and a confirmation, because he cannot plead double, yet that cannot apply to the King; but I am so confident that it is impossible to consider this as a nullity, that I am very little anxious as to the fate of that part of the argument.

I then come to the point which my learned friends seem to have strongly wished, if they could possibly, to have wholly avoided. I mean the effect of the judgment *quousque* upon this record; for if they fail in that they fail in every thing, and there is an end of their case.

My learned friend (Mr. Bower) was very desirous of making an impression upon your lordships' minds (wisely if he could have effected it) by first considering this as if a writ of seizure had issued; but I think your lordships will find that he afterwards forgot to consider it materially in any other point of view. He admits that it is merely process to enforce appearance.

It may be material to your lordships (I don't say to understand, for that I am sure you do already, but) to be reminded a little of the antient law upon this subject, and the nature of proceedings in eyre; I can refer your lordships to an authority much more antient than any that has yet been mentioned, and which states (as many of our antient books do) with great clearness and precision, the very origin and foundation of the matter in question; I mean a treatise of the law, of great antiquity, and very well known to your lordships, under the name of *Britton*, which treats of the jurisdiction of the eyre. He states, "That with respect to our commission, and the eyre of our judges, our will is, that public proclamation be made in our market, and that as well within franchise as without, that all the freeholders may attend, and that all those who claim any franchise in the county, on some day before us, or our justices before us come, and deliver the account in writing of what franchise he claims."

Your lordships see, therefore, that upon the coming of the eyre into any county, the proclamations of the eyre are considered as notices to the owners of franchises within that county, and it is incumbent upon them to come in and claim their franchises.

My friend chose to state the statute of *quo warranto*, commonly called the statute of Gloucester, as a statute made merely for the ease and benefit of the subject; I conceive it is a statute made for the good of the crown also, and perhaps for the general

general government (according to the policy of those times) of the kingdom; for there being a vast number of unfounded claims of franchises set up against the crown in times of violence, it became extremely necessary, for the security of the just prerogative of the crown, and for the general good order and government of the kingdom, that the King should have some means of knowing distinctly what franchises were claimed, and how they were supported; I conceive that to be the policy of the statute of Gloucester; and, therefore, it seems to me to be throwing the *onus* upon those who claim franchises, to come in and claim them at the eyre.

The book goes on to state, "Let the petitions of those who claim franchises in the city be received, come they from whom they will, and let their claims be enrolled, and a transcript of the same enrolment be delivered to the sheriff; and as to all such franchises as are not claimed, let the sheriffs be commanded to seize them in the name of a distress, and be answerable to us for the issues, until those who shall claim them have saved their defaults for not attending the summons; and let them *afterwards* shew by what authority they have enjoyed such franchise." Now can any thing point out with more distinctness and precision the origin of this process? for *process* it is; and there lies the fallacy of the whole argument.

My learned friend has argued it throughout as that kind of *judgment* in the legal sense and acceptance of the word, which requires to be appealed from, and is the subject-matter of, a writ of error. I contend that it is no such thing—that it is incorrectly called a judgment at all—and that this judgment *quousque* is nothing but process to compel appearance—and that it can do away the rights of no persons. That is distinctly stated in this book—it states the obligation to come in; and of such as did not come in, "let the sheriffs be commanded to seize them in the name of a distress, and be answerable to us for the issues until those who shall claim them have saved their defaults for not attending the summons, and let them afterwards shew by what authority they have enjoyed the franchise."

That is a distinct state of the nature of it; that command to the sheriff to seize is the judgment *quousque*, it is no other. My friend often called it, with more correctness than he seemed to wish upon the face of this argument, an *award*. The term "award" is applied to process in the law. My friend's technical knowledge suggested the word to him; he has heard of an award of process repeatedly, but he never heard that that *award* of process was a *judgment*, the subject of a writ of error, or a judgment by which any persons could be ousted of their franchises.—Here it is expressly stated, that the sheriffs shall be commanded to seize into their hands, and that they shall hold them—till when? till they appear and shew by what authority they claim the franchise.

Is not that plainly nothing but process to procure appearance? does it not look to a future judgment to compel them to come in? When one strips this process of the puzzle which has arisen from calling it a judgment at all, which, in truth, it is not, nothing upon earth can be clearer than this question.

Your lordships will find in the chapter of franchises, in the same book of *Britton*, pages 105 and 106, a direction given for inquiry, what persons in the county claim to have returns of writs, or the custody of our seal, or to appoint their own coroner; and so of a variety of other franchises that are named in the book, or who claim any kind of exemption more than other people—and then it says,

"Let the presentments upon such articles be pleaded in this manner:—First, The claimants shall be ordered to appear on such reasonable summons as shall be mentioned in the chapter of summonses; and then if the summons be attested, and they make default, the franchise shall be seized into hands, and the sheriff shall be answerable to us for the issues, and to remain in our hands until the claimants appear and answer; and if those who made such default, have, of their own wrong, usurped such franchises upon us, our will is, that they shall be distrained on in such manner as shall be mentioned in the chapter concerning attachments in trespass and debt; and if they cannot clear themselves, in terms, of the personal wrongs

wrongs committed against us, a clear disherison of land (but then that is when they have appeared and cannot clear themselves) and that they be disinherited thereof."

"Then our attorney shall immediately cause our writs of quo warranto to issue against them, and by such writs they shall be summoned; upon which, if they make default, the franchises shall be seized into our hands, as above set forth, and so remain, without any further summons, until our further orders."

The very terms of the judgment *quousque* are to be found in this antient authority.

"If they come in and answer, judgment shall be respited for the determination of us and our council, whether such answer be a continuance of the wrong done to our crown, or a title of right in the tenants;"—so that your lordships see, that when this matter comes to be traced to its source, and to be examined with that peripicuity that is to be found in our antient books of the law, you will find all the puzzle is of modern date, by confounding things.

The truth is, that this (*judgment*, as it is called, but really this) *award* and order of seizure *quousque* took its origin from the nature of the eyre, which is a general call upon all the claimers of franchises to come in and claim; that if they did not come in to claim, it was awarded (to use the term of my learned friend, which I like well, because it is applied to process, which is the truth of the case, it was awarded) that the sheriff should seize; it appears also, that the sheriff actually seized, for he is directed to hold the issues in his hands until—until when? until the party shall appear and answer; if the party shall come in, then it is to be inquired whether he has title to the franchise, and if he has not, judgment is to be given against him.

This is the language of law, of reason, and of common sense—not that a writ of distress shall be considered as a judgment. There is no case in the law where, without any future judgment pronounced, a writ of distress should grow up into a judgment; judgment *quousque* is the award of the writ of seizure, and no more; without the writ of seizure it is nothing—it passes nothing—it has no words that convey any thing—it is a mere order to attend and to seize till the party shall answer, or till the further order of the court—if the sheriff does not seize, it is nothing; for it is a mere process—a process unexecuted. Then calling it a judgment is the cause of all this confusion, and my learned friends having nothing to say in this case, have artfully availed themselves of that confusion by applying all the authorities which are to be found in the books, as to the effect of judgments to this thing which they call a judgment, but which they admit in the outset is nothing but a process to compel appearance.

It might possibly be used as an argument, that to have any effect at all it may become, under certain circumstances, the ground of a *final* judgment; but it can never be argued, that a process, to become effectual, should of itself grow up into a judgment; the thing is impossible and against all the rules of law.

I believe it was never in the idea of the justices itinerant, or any of the old lawyers in the kingdom, to apply this process to the franchise of being a corporation. Those who claim franchises are to come in—the franchises enumerated are markets, fairs, keeping gaol, the right of tolls, exemption from tolls, and such as are the subject of profit, or of manual occupation; but as to the mere capacity of being a corporation, it never, I believe, anterior to some of the modern niceties that have been taken up, entered the head of man, that it could be the subject of seizure at all.

It supposes there is something to be seized, and the sheriff is to account to the King—account for what? The franchise of being a corporation! And though it was endeavoured to be explained away by calling it metaphysical reasoning, there is much good sense in the distinctions laid down in the books, and against which I have not heard one authority cited, between a quo warranto or a process exhibited against any party, to shew by what right they exercise particular franchises, and a corporation for claiming to exercise the franchise of being a corporation; I only require

require to know what is the franchise of being a corporation; and that is clearly distinguishable without any metaphysics at all.

The distinction is plain and obvious. One or more persons may be possessed of franchises by the grant or prescription which shall be the object of profit, which may be granted and regranted, or conveyed from one to another. But the existence of the body politic of a corporation consists in associating more persons than one (I am speaking of corporations aggregate) in such a way as to enable them to act as one person might do, and that alone I conceive to be the essence (and it reconciles all the contradictions which appear in the books upon the subject) of the franchise of being a corporation. When any number of persons are so united together by an act of incorporation, as to be capable of acting as one man might do—of taking and making grants—of making laws for the government of a city—and acting as a great magistrate might do—it is impossible that this capacity of acting jointly, which the law does not otherwise give, till they are united by being made a corporation, can be the subject matter of a seizure—or that an information can be proper against such an abstract politic capacity.

I desire no better language than that of Lord Holt to express this distinction; he gives his opinion (let them take the whole force of it against us, upon that part of the argument, if they please) that a corporation may be forfeited; but he gives it as his clear opinion (in which there was no difference of opinion between him and the other judges) that such a proceeding cannot be regularly had against the corporation *itself* as a body politic; and common sense shews it.

To oust them from the capacity of acting, is not the subject-matter of an information against them under that description; for the effect of it is, if any, to separate the politic capacity from the natural persons who have held it; then that must be done by an information against the natural persons, and not the body politic:—An information against A. as mayor—against the twenty-four letters as aldermen—and forty others as common-council-men, to know why they claim to be a corporation, is just and proper; and if they in answer, can shew no title, they are ousted—if there never has been a corporation, then they are justly ousted.

Another absurdity is that of filing an information in quo warranto against a body politic for being a body politic—if they are not a body politic they can never appear to that information, they will be prejudged of their franchise without being able to appear; and, therefore, there are no persons in existence who can appear to an information charging them as a body politic, to answer for usurping to be a body politic.

Therefore, whatever may be the difference of the opinions of the judges, upon that question, whether the essence of being a body politic, which I have endeavored to define, may or may not be forfeited at all—there is none in this, that they cannot be called upon to defend that franchise as a body corporate. But if such and such persons claim to have a market, the government of an hospital, &c. they are properly called upon, they can appear by their corporation seal, and tell why they claim it, and if they do not claim it, can be ousted from it; because it is a thing separate from their political capacity, and capable of seizure.

I have been accused by Mr. Bower, when I troubled your lordships with reference to the remarkable case of the quo warranto of the city of London, of stating only one side of the argument; there was some foundation for the accusation, but not in the way in which my learned friend put it; for he would have it inferred, that I had stated only the arguments that were used in favour of the city of London.

Now I appeal to your lordships that I have taken the direct contrary course, and stated very little from the case of the quo warranto, except what I took from the argument of Sir Robert Sawyer. I could not have called upon your lordships to consider any thing that was said by Sir George Treby, great as he was in the law, while pleading for his clients as recorder of London; but I could claim some attention when I quoted what that great lawyer (Sir Robert Sawyer) said, when
pleading

pleading for the crown, in a matter which the King had almost as much at heart as the crown upon his head. I am in your lordships' recollection, and will not, at this late hour, re-state what I have said, but appeal to your lordships' inspection of the book hereafter, that all the distinctions I am now arguing from, all the distinctions between the proper persons against whom informations should be filed, and the proper judgments on those informations, were taken by me wholly from the argument of Sir Robert Sawyer; and I say, that he collects them correctly, and concurs with me, and all the lawyers who have ever written and spoken (till the argument upon the present question) that the proper information for usurping *particular franchises* is against the body politic—the proper information for claiming to be a *body politic*, is against the individual persons; he concurs with me, that the proper judgment against particular persons claiming a franchise, is *seizure of the body* and judgment of ouster. I have cited high authorities to shew, that nothing short of a direct adjudication, that the parties shall be excluded from their franchise, can have that operation in point of law.

My learned friend, in arguing that judgment of seizure, has forgot to lay down what he begged leave to take up at the beginning, considering this as if a writ of seizure had issued. He says, the King, by the seizure, is possessed of a defeasible interest; be it so. Then he says, the King, therefore, while he is possessed of that defeasible interest, may grant that defeasible interest; for he may grant that which he has.

In the first place, that argument can never apply till there has been a seizure, and till the King has it.

In the next place, it won't serve my learned friend's purpose if it does apply; for Charles II. has made a corporation in perpetuity, or none at all; and *there* applies the authority suggested in one of the printed reasons of the case, if I recollect right, that the King cannot grant more than he has; and, therefore, in the authority cited from *Sheppard* (I think it is) if the King, having only the custody of land, grants the land itself, the grant shall be void. Good God! can the application be more direct, even taking my learned friend's argument to be right? If the King has only the custody of the rights of the corporation, and grants the corporation itself, surely his grant shall be void. If the King has only a defeasible interest—and he has granted an indefeasible interest—if he has granted the corporation when he had only the custody of it by the seizure, then the grant is void.

My learned friends have argued, “but if this defeasible interest be not replevied, it must remain in the King's hands, for there is no other way in which it can be taken out;” I deny that. The King may give it back if he pleases; if the King has a defeasible interest is it possible to contend that he may not part with that defeasible interest? This proceeding is not in the eyre—the process may be effectuated at a distance of time—and it is not essential to the King's-bench, that a process, determinable there, should be determined in any precise time whatever.

My learned friend then recurs to a part of the case which I thought nobody would ever resort to again—which I thought had been forgotten and buried in silence; I mean the supposed authority of the case in the 15 *Edward IV.* I am perfectly indifferent whether your lordships agree with my friend in supposing the authority of the Year-book to be a better authority than *Jenkins* or not, because there is no contradiction between them; your lordships have only to read the correct account of it given in the Year-book, and there is nothing so clear, as that no authority is to be found there *against* the opinion in *Jenkins*; or *for* that doctrine the case is cited to support.

Your lordships will see, that those who argue on the other side are *counsel*, and not *judges*; and that when the chief justice of the King's-bench comes to inquire what judgment shall be given, and whether it shall be a final judgment of ouster or of seizure only—it is agreed it shall be a judgment of *seizure*. Then what does *Jenkins* report? your lordships know; indeed I have my friend's own authority in another part of his argument; he said, “he should cite but few authorities to one

point, because one was *Jenkins*, who was a very high authority." The next day he tells your lordships, that *Jenkins* is wrong in what he has reported as the unanimous opinion of eight judges, in the Exchequer Chamber!—that no such thing ever happened, and he is totally mistaken!

I shall only refer your lordships to the record itself, to confirm the opinion of *Jenkins*; for from the record it is evident, that the opinion of all the judges in the Exchequer, upon solemn argument, was, that the franchise was not the subject of forfeiture before appearance; and, therefore, the judgment was ordered to be—not that it should be seized as forfeited—not that the party should be ousted of the franchise, but that it should be seized till the court should further order. It is a new, a modern, discovery indeed, to attribute to that judgment any other effect. My friend wants your lordships to believe, that the subsequent process was irregular; all I contend is, that whether regular or irregular, it furnishes a decisive proof that a judgment *quousque* was not conceived to have any other operation.

But at the time when these pleadings were drawn, and settled by my friend, the recorder of Chester (than whom no man could settle them with more accuracy and ability) it was not found out that a judgment *quousque* was sufficient to cause a forfeiture; for if it had he would have looked out for the boon which we had given him; we had stated that judgment *quousque*; he would have made us a bow for that favour; he would have told us we had saved him the trouble of a rejoinder; for by that judgment the business was completely done, the charter of Henry VII. was at an end, and there was no subsisting charter but that of Charles II. instead of which my friend has taken the pains to draw a long rejoinder, the offspring of a fertile imagination, and to alledge, that after this judgment *quousque*, such farther proceedings were had that, by virtue of them, the old corporation became incorporate and dissolved, &c.

Would my friend have done that—would the suggestion which is negatived by the jury (which, therefore, was a mere creature of the imagination) have ever entered into his head if he, or any other man, had believed it any more than a mere process, a mere mandate for a writ of seizure? Or would he have been at the pains of stating a fact upon which he knew we must join issue, and that the issue would be found against him?

Your lordships must impute too the greatest absurdity to the proceedings of the greatest lawyers that ever existed; for all the final judgments, from the first existence of law down to the time I am now speaking, in quo warranto, are just so much of waste paper, if the argument of my learned friend is right. They might have rested with more safety upon the judgment *quousque*; for those who wanted to tear away the rest of the corporations, would have had less trouble in that method, than afterwards issuing out nugatory processes, giving them time to come in, and then proceeding to that solemn farce of a final judgment, after a judgment which was previously final in its operation.

My lords, hitherto I have considered this judgment *quousque* as a process, and as merely a process—it is less than a process! it is nothing but the mandate for a process! a process may produce legal effects, because it must be served upon the party, and return must be made to that process; the court will see whether that party has been served, or has so eluded justice as to be the subject of a process of another, a different, description; but was it ever heard that an award of process should ever subject a man to a penalty for default of appearance? and this judgment *quousque* can be considered in no other light.

Your lordships find in all other instances, wherever there was a serious and deliberate intention of overturning the franchises of a corporation, they have never thought of this trick, by saying, "we will issue an award of a writ of seizure—we will give a judgment *quousque*; the attorney-general will take care it shall never be served; no writ of seizure shall issue, but next term he shall come and shut the doors for ever against people upon whom no process had ever been served." If such a doctrine could be received, it would be not only contrary to every principle of law—

law—contrary to the practice of every court upon earth, but it would be attended with mischief so big, that if your lordships found yourselves forced to give such a judgment in your judicial capacity to-day, you would find yourselves called upon to redress it in your legislative capacity to-morrow; nay I am sure one or other of your lordships who hear me, would instantly bring in a bill for abrogating such a practice.

I, therefore, conceive it is impossible to contend, that a judgment *quousque* should have such an effect. I call it a judgment merely in compliance with the terms of the record and the phrase of my learned friends; but in no one sense does it partake of the nature of a judgment; and that leads me to another argument of my learned friend, which shews the distress he is driven to upon this point (which I think the broad ground of the case) that supposing it to be informal, it must stand good till reversed. My answer is, *that there is nothing to reverse!* how would my friend bring a writ of error upon this *quousque* judgment? a writ of error upon an order to the sheriff to seize! the truth is, there is nothing to reverse; but then, says he, “by this the King has got possession *de facto* of your franchises, and you have not stated that you have ever got them back again.”

I give two answers to that: first, the King *de facto* has not got possession; for this judgment, award, process, distress, or whatever you may call it—this *quousque* judgment has never been carried into effect! for all the process subsequent to it is negatived by the finding of the jury. Then I say the King has possession of nothing *de facto*—I say that the corporators of Chester were not ousted either in law or in fact; then there was nothing which could be the subject of a writ of error—there was nothing to replevy, because nothing had been seized; otherwise the corporation must be in a miserable state indeed! There is a judgment against which they cannot have a writ of error, for it is not a judgment; and they cannot replevy, because there has never been a seizure!

But the answer, which I think very sufficient, is, that the King had not the franchise, and that it was never out of their hands to be the subject of replevy. Another answer is, that if the King had it, he has given it them back again; if it be true that the King had the franchises of the corporation of Chester, it is admitted that he had them only as a defeasible estate; it is admitted that he could not, therefore, grant them indefeasibly to another body. If his charter was the grant of a defeasible estate only, he granted no more to the new corporation, if I may so call it, than what was defeasible in its nature, and admitted to be so; his successor (who was the same as himself) afterwards thinks fit to give back the perpetual interest to the party who had it before; and what principle of law shall restrain him from so doing?

Therefore, whatever view your lordships take of this case, in every way of considering it, there is an end of all possibility of your lordships giving judgment for the defendant; and the converse is true, I conceive, upon the authorities I have stated, that you must give judgment for the crown.

I will, before I return your lordships my final thanks for the great indulgence I have experienced, recapitulate, shortly, the grounds of the argument. They seem to be these:

First, that the defendant has failed of stating a complete title himself.

That if the charter of Charles II. stood unimpeached by any thing extrinsic, he has not set forth even under that charter, such as it was, a sufficient title, because he has never given life and existence to the electing body under that charter.—Next, if he has done so, and if that body ever had *actual* existence, that it never had *legal* existence, because that charter was void, as containing a void condition of a power of amotion. That power of amotion not being capable of being exercised by law, the King did not mean to grant the perpetual existence of the corporation, otherwise than subject to that illegal power. Your lordships cannot construe the act of King against himself, as giving that which he did not mean to give; the citizens and inhabitants are not permitted by law to accept a part without accepting the whole;

whole ; therefore the charter of Charles II. never existed—it fell a victim to its own inherent vices—it died by a disorder it had at its birth, and before it could ever come into activity.

If the charter of Charles II. had no inherent defect, it must fall, because it had not a ground upon which it could stand ; since a new charter of incorporation cannot be given to a place where there is a subsisting corporation at the time. It is expressly found, that at the time of the information by Sir Robert Sawyer, and at the time of this judgment *quousque*, there was a subsisting corporation in Chester, under the charter of Henry VII. confirmed by Elizabeth ; that charter I have argued, and I hope proved fully, was properly granted under the seal of the county palatine ; and, therefore, was subsisting at the time of the judgment *quousque* ; if it was subsisting then, it is subsisting now, unless something has been done to defeat it ; that something cannot, I hope I have satisfied your lordships, be the effect of a judgment *quousque* ; if it, therefore, was subsisting at the time of the judgment *quousque*, and was not defeated by it, then the defendant has no title.

It is not averred by the defendant, that the persons moved were in fact restored—it is not averred, that a writ of seizure ever issued to vest the actual possession of the franchises in the crown ; the crown, therefore, was possessed of nothing which could be the subject of a grant at all ; but if the crown was possessed of any thing that could be the subject of a grant, it is admitted that it was possessed only of a defeasible interest ; that it could, therefore, grant nothing but a defeasible interest. Being possessed, therefore, of that defeasible interest, the crown has re-granted that defeasible interest to a body which had a corporate existence at the time, capable of accepting ; and it is admitted, that there were corporate persons existing capable of acting under the charter of James II. to whom it was directed, because the acceptance of that charter is admitted.

Supposing for a moment, that all these arguments should fail—supposing for a moment, that your lordships could intend, from any thing upon this record, and in defiance of all the legal authorities I have stated, that the charter of Charles II. subsisted and was in force even at the date of the charter of James II. then I contend, that it appears upon this record, that the charter of James II. is granted to the same description of men as the charter of Charles II. if they were then in being ; for the charter of Charles II. incorporated the inhabitants of Chester by the name of the mayor and citizens of Chester. The charter of James II. is directed to the mayor and citizens of Chester *eo nomine* ; it is expressly found that the mayor and citizens accepted ; there could not be two mayors and two sets of citizens at that time ; and if the persons who accepted that charter of James II. were the persons who were incorporated by the name of citizens of Chester, by Charles II. then they have accepted a subsequent charter *in toto*, and thereby done away the provisions of the former.

Therefore, whether you consider the case according to the legal effects of the instruments, or according to the facts upon the record—whether you shut your eyes to the acts of parliament, histories, and judicial authorities—or whether you take them all in aid ; in every way it can be put, it seems either that this charter of Charles II. never had any existence at all, or that it was legally done away before Mr. Amery was born.

I have now to return your lordships my thanks for that degree of attention with which I have been honoured, and which nothing that comes from me can deserve. Your lordships' decision, in this cause, will be looked up to in this kingdom ;—it will be the leading rule of law in corporations in future ; but if your lordships affirm this judgment, we shall have to unlearn all that we have ever learned upon corporation law.

QUESTIONS PUT TO THE JUDGES.

LORD CHANCELLOR.

My Lords,

ACCORDING to the best information I can obtain of what passed in the King's-bench, the argument there was much shorter, as to points, than it has been here.

I will not attempt now to recommend it to your lordships, without the assistance of the learned judges, to form any opinion upon the subject; nor at this time of day, after you have heard the case so explicitly stated, and argued so much at length, shall I have any anxiety for doing more than to put the questions to the learned judges in such a form as will embrace all the points material for consideration. They lie within a very narrow compass in point of general statement, though in a very large one as to particulars. One point is this, Whether the defendant, being called upon by the crown to shew his title to the office he holds, has set forth a sufficient title in his plea? And upon that they have come very near to an issue in the argument; for it is agreed on all hands, that this plea is new in this respect—that it has not previously stated an existing corporation, in its own nature capable of continuance, from which he might regularly derive his title, but relies merely upon the averment of an election. So that the only question upon that point is, whether that averment (especially in this state of the pleading) shall intend, upon the matter stated before, that there was a full corporation, capable of continuance, and consequently comprized within the general compass of this averment. On this the whole may depend; but supposing it to be found in favour of the defendant, the next question will arise upon this—Whether the title the defendant has set up under the charter of Charles II. is not avoided by nullity in that charter, sufficiently stated in the first replication? though it is thus pleaded, as your lordships observe, *not with a conclusion that the charter is therefore void*, but in order to draw to another conclusion, by the introduction of another fact—namely, that the charter has been, in point of fact, *revoked*. Upon that replication, therefore, these two questions arise—

1. Is there a nullity sufficiently stated upon this record for you to declare, that the charter is void, either in respect of the power of revocation being annexed to the charter in general, or in respect of any peculiarities relative to the constitution to which this charter is applied? if they are sufficiently upon the record, by the averments contained in it, or by the articles, of which your lordships must take judicial notice, this question will be raised, otherwise not.

2. Whether the King has exercised the *very authority* intended to be reserved—namely, the revocation of the whole grant, or whether that authority being short of moving the whole corporation, and extending only to a part, an amoval of the whole is not in itself a void act?

The second replication introduces this point, namely, that there was a subsisting corporation *before*, incompatible with that supposed to be granted by King Charles II. this also is left purely upon the statement in the replication, which does not draw the conclusion, that it was so existing as to be incompatible with the exercise of the charter of Charles II. it is contended, that it will have the same effect upon this record as if it had been so concluded.

The next question introduced upon the second replication, is the statement of a judgment in avoidance of that very constitution which it was at first argued was incompatible with the exercise of the charter of Charles II. (I do not enter into a distinction between the judgment and award of process.) It is concluded, that if that judgment was not, in its own effect sufficient to annihilate, or put an end to, the ancient charter for a moment; and though perhaps it is declared that it was the

pardon

pardon which restored that charter, and that *from that time* the corporation *existed again*; yet it is insisted, that upon the matter stated in this replication, it ought to appear, that the corporation has *continually* existed, and existed in such an extent, as to preclude the possibility of granting another charter.

I will not trouble your lordships with the rejoinder or sur-rejoinder, because they have only introduced certain findings, which, if they bear upon the subject-matter at all, will bear upon the replications.

I believe I have said enough to satisfy your lordships, that the two questions I have to propose will embrace all the points in the case.

First—Whether the matter of the plea, as the same stands admitted or found by the verdict, is sufficient to support the defendant's title to the office of alderman in question?

Secondly—Whether the matter of the replications, admitted or found by the verdict, is sufficient to avoid such title?

Adjourned.

OPINION OF THE JUDGES.

April the 20th, 1790.

LORD CHIEF BARONE EYRE.

My Lords,

WE have considered these questions, and have agreed upon the answers to be given to your lordships upon them. I will deliver to your lordships, as shortly as I possibly can, what appear to me (and for which I hold myself alone responsible) to be the grounds upon which those answers are founded.

My lords, this is a proceeding by information, in the nature of a writ of *quo warranto*, in which the defendant is charged with having used and exercised the office of an alderman of Chester, without any legal warrant; and with claiming, without any legal warrant, to be an alderman of the city of Chester; the mayor and citizens of which are stated to be a body corporate, by the name of mayor and citizens of the city of Chester, and within and for which city of Chester there are twenty-four aldermen; and that the office of an alderman of the said city is a public office, and a place and office of great trust and pre-eminence within the said city of Chester, touching the rule and government of the said city, and the administration of public justice within the same.

My lords, in a proceeding of this nature, as well as in a proceeding by the original writ of *quo warranto*, it is incumbent on the defendant—(and it was so agreed in the argument)—to shew a complete title in himself upon the record, to the franchise which he claims. It was evidently so in the proceedings on the writ; for by the writ the party was merely summoned to answer the King *de placito quo warranto*, and nothing short of a sufficient warrant, fully stated in the body of the plea, could be an answer. Perhaps in a proceeding by information in the nature of *quo warranto*, which may state, by way of inducement and introduction, some facts which make a part of the defendant's title; he may be allowed to incorporate them into his plea. Thus, in the present case, the defendant refers to an allegation in the information. He says, true it is, that Chester is an antient city, and that the mayor and citizens of the city of Chester, are, and have been, a body corporate, by the name of the mayor and citizens of the city of Chester. He then pleads, that King Charles II. by his letters patent, bearing date the fourth of February, in the thirty-seventh year of his reign, incorporated the citizens and inhabitants (certain persons only excepted) by the name of the mayor and citizens of the city of Chester, and granted that there should be within the said city, one principal magistrate

trate or officer, who should be called mayor of the city of Chester—a recorder—twenty four aldermen—forty common-council—two sheriffs, &c. and that he nominated the twenty-four aldermen.

The plea then states, that by the charter there was a provision made for an annual election of the mayor—for an occasional election of mayor, in the event of his death during the year, or in the event of his being removed from his office. In the former case, that election was made by the mayor, aldermen, and the common-council; and in the latter, by the aldermen and common-council.

It also states, that there was a mode of election established for the election of aldermen, in the case of death or of removal, and that election was to be made by the mayor, and the residue of the aldermen and the common-council.

It then states, that the King, by those letters patent, authorized certain persons named in the letters patent, to administer certain oaths directed by the charter to the then appointed mayor, aldermen, and common-council, *not having before stated that there were mayor, aldermen, and common-council before appointed.*

It states also, that by these letters patent, the mayor, recorder, and justices, then appointed, had power to administer the oaths to those persons who were to take upon themselves their different situations in this corporation.

It states, that the charter was accepted by the citizens and inhabitants—that the persons named in it to be aldermen, became aldermen according to the form and effect of the letters patent—and that from time to time, hitherto there ought to have been, and still are, twenty-four aldermen of the city, as by the information is alleged.

It states the defendant's own election upon the first of March, in the twenty-second year of his present Majesty's reign, by the major part of the then mayor, aldermen, and common-council.

It states his taking the oaths before the then mayor, and his being admitted to the office. This he undertakes to verify, and by this warrant he claims to be an alderman of the corporation.

My lords, this plea professes to claim the franchise of being an alderman of Chester, in that corporation which was created by the letters patent stated in the plea—by warrant of an election to that office, by a body of electors competent to elect under, and by virtue of these letters patent.

The first question which arises upon it is, whether the plea appears to have sufficiently expressed and executed its purpose.

It states the letters patent duly accepted, by virtue of which *prima facie* the citizens and inhabitants, with the exception of certain persons, are well incorporated by the name of the mayor and citizens of the city of Chester, into a body corporate, having perpetuity.

And it goes so far towards averring, that it has continued to this time—that it allows the allegation of the information that the mayor and citizens of Chester are at this day a body corporate, by the name of the mayor and citizens of the city of Chester, to be true; and, to a common intent, this would be sufficient if it were necessary that there should be such an averment. For the description of the persons incorporated mayor and citizens in the information, and citizens and inhabitants in the plea, considered as a description of individual persons, before incorporation, is substantially the same in both; and we think there ought not to be made an intendment so foreign, as that there might be two bodies incorporated by the same name in one place, at the same time. But further, it was not necessary that this should be averred in the case of a corporation by charter, which shall be taken to continue by force of the charter, till the contrary is shewn, even against the King.

My lords, we may, therefore, assume, that the existence of a body corporate in Chester, under the charter of Charles II. is sufficiently pleaded.

It seems also sufficiently pleaded, that there is an office of alderman in this corporation; for it is expressly stated, that the persons who were the first twenty-four aldermen were appointed; and it is averred, that they became the aldermen, and

that there still are twenty-four aldermen; that there was a mode of election provided in the case of death or removal of one or more aldermen, *videlicet*, by the mayor, the residue of the aldermen, and the common-council, out of the common-council.

It is also averred, that there were persons of the description of mayor, aldermen, and common-council, who *de facto* elected this defendant, and that there was a common-council, out of which they were so elected.

It is not shewn, nor is it even averred, that the persons who *de facto* elected the mayor and common-council in particular, were competent, in point of title, to elect; nor that the body out of whom the election was *de facto* made, was the body out of which the letters patent provided that it should be made. It is not shewn to the court, in the direct and proper course of pleading the contents of the letters patent, that there was a mayor or common-council appointed by the letters patent, much less who those persons were who were so appointed; nor is it shewn, that there was any mode of election provided for continuing the common-council.

That by reason of these defects, this plea would have been held to be bad in point of title upon demurrer, was hardly denied at the bar; but the question your lordships have been pleased to propose calls upon us to consider, whether the matter of the plea be sufficient to support the defendant's title in the actual circumstances, there being no demurrer, and the prosecutor having replied and taken issue upon the election, upon which issue there has been a verdict for the defendant; and having also replied special matter, upon which there have been issues joined, and verdicts upon those issues.

My lords, it was argued at the bar, that the prosecutor having taken issue on the election, and the issue being found for the defendant, the plea would be good after verdict by the statute of *Jeofails*; and there were many authorities cited, where, after verdict, defects in pleadings had been aided; I could not collect upon which of the statutes of *Jeofails* in particular the argument was rested, nor how the statutes were to operate upon it, nor what principle could be collected from the authorities, which would govern this particular case.

The statutes of *Jeofails* do undoubtedly cure a great number of specific errors, of which, they provide, that after a certain time, in certain situations of the cause, no advantage shall be taken; and I may state it as the general result of all the statutes of *Jeofails*, that they have established this proposition—"that after verdict the court shall give judgment according as, upon a view of the whole record, the very right of the cause and matter of law doth require, notwithstanding any imperfection or defects in pleading."

The statute of Queen Ann also adds (rather, I think, unnecessarily) "so as sufficient matter appear in the pleadings, upon which the court may give judgment according to the very right of the cause."

I know that some learned men of our profession have thought, that the statute of Harry VIII. which was the first of these statutes of *Jeofails*, was intended to go much farther, and to establish, that judgments should, in all cases, follow the verdict; but the contemporary exposition was otherwise—the uniform practice of Westminster-hall has been otherwise—and surely the good sense of the case is otherwise; for unless the verdict does really decide, when it is added to the pleadings in the cause, where the very right of the cause lies, how can the court give judgment? what judgment shall they give? and for whom shall they give it? Under no circumstances can judgment be given for the plaintiff, unless it appears that he has a good cause of action; under no circumstances can judgment be given for a defendant, against a plaintiff who has a good cause of action, unless a defence sufficient in law appears upon the record.

"After verdict," therefore, in the statute of *Jeofails*, appears to me to be nothing more than a description of a period in the history of the cause, after which no advantage shall be taken of certain errors, but the court is to examine the whole record, and where sufficient matter appears in the pleadings, upon which the court
may

may give judgment, to give that judgment according to the very right of the cause; and it does not appear to me that the statutes of Jeofails have at all authorized the court to make inferences, or to draw conclusions from verdicts; nor do I take it to be necessary that they should have done it, because I take it, that at the common law, it was the office of the court to make those inferences, and to draw those conclusions; and not from verdicts only, but from all parts of the proceedings.

But this is a very different operation from the immediate operation of the statutes of Jeofails; for by just inferences and reasonable intendments, from verdicts and pleading, we supply what seems to be wanting, and then there is no error upon the record. Whereas the direct operation of the statutes of Jeofails, except in the few cases where they authorize amendments, with or without inquiry, as to matter of fact, supposes that error does exist upon the record, but pronounces that no advantage shall be taken of it when the real justice of the case can be seen.

This distinction appears obvious, but I think it has not always been sufficiently marked in the discussion of questions of error brought forward after verdict. In many cases where an objection has been taken, it has received a short answer, that the pleadings are good, or the defects cured, after verdict, by the statutes of Jeofails; I cannot but think that this is very unsatisfactory, and that it would be far more intelligible to say, that the statutes of Jeofails have enabled us to look at the whole record—to take it together—to collect the merits of the case together, however scattered and dispersed they may lie in the record, and to give judgment upon the whole, according to the real justice of the case.

Then it may be said, that having looked in this manner through the record, we find, that the omission of the count is supplied by the direct and implied admissions in the subsequent pleadings, or by the reasonable implications in the verdict; and, therefore, though the plaintiff or defendant has stated his case negligently or informally—of which advantage might have been taken upon demurrer—yet we now see, that the circumstances which were essential to the merits of his case, and which he had not properly stated, do really exist in it, that the justice of the case is with him; and, therefore, he is entitled to judgment.

My lords, it is by this sort of process that the defects in this plea are to be cured, if they are curable; and indeed the very terms of the question proposed, unavoidably lead to this kind of examination—we are asked how this stands now after verdict, and upon the admissions in the cause?

With regard to this, it is to be observed, that the defects in it are defects of omission only, which are far more easily cured than affirmative errors; they are necessarily removed as soon as the omission is supplied.

It may be collected how entirely these defects are the defects of omission, from hence, that the plea, though it has omitted to state, for instance, that there was a mayor, and that there were common-council appointed; has stated a commission given by the very charter, to swear the then appointed mayor, aldermen, and common-council; and the averment of an election, by mayor, aldermen, and common-council, does (however informal it may be in point of pleading) to a common apprehension, involve in it an averment, that there was a mayor, aldermen, and common-council existing to elect.

And when the prosecutor takes issue upon this, and insists that the defendant was not elected by the mayor, alderman, and common-council, it should seem that he must be understood either to admit that there was a mayor, aldermen, and common-council, and to deny that they elected the defendant, which, as I shall shew hereafter, will conclude him as to the existence of mayor, aldermen, and common-council; or he must mean to put the whole in issue, including the existence of mayor, aldermen, and common-council. In the latter case, being involved in the issue, it is necessarily involved and implicitly found in the verdict, so that we cannot avoid seeing, upon the whole of the record, that there was a mayor, aldermen, and common-council, who did make this election. If we can see it, and it is upon

the record, it is matter of form only whether it is stated exactly in the proper place, and of that matter of form it is now too late to complain.

Such was the effect of the verdict in the case of the Bishop of Llandaff, which was cited at the bar, from Sir *John Strange's* Reports, and which is the only authority I shall refer your lordships to upon this part of the case, as it was one of the last cases, and because Lord Hardwicke presided in the court of King's-bench, when it was determined, which establishes its authority.

The presentation being implicitly found by the verdict, it ceased to be an objection, that the presentation was not stated in the declaration, and yet, for the want of it, the declaration was certainly bad, if they had taken their objection to it at the proper time.

I might rest this part of the case here, observing only, that if the finding that the mayor, aldermen, and common-council, did elect, necessarily implies that it was sufficiently proved that there was a mayor, aldermen, and common-council, to elect; it also implicates the regular constitution of that body corporate, in which that mayor, aldermen, and common-council, are inherent, and then the whole objection to the plea would be disposed of.

But my lords, the case does not rest here. What may be supplied by the verdict may also be supplied by the adverse party's pleading; he may admit that which either is not stated at all, or defectively stated by his adversary.

The first special replication to this proceeds *in toto* upon the ground of the corporation having been well constituted under the letters patent of Charles II. and of there being a mayor, aldermen, and common-council, existing at the time that it refers to under these letters patent;—it confesses that the power of electing aldermen had existed up to the time of the motion, when it avers, that it ceased by means of that motion. This involves that there were mayor, aldermen, and common-council, under the charter, to elect, by necessary implication.

It goes further; for as to aldermen and common-council men, it expressly avers, that certain persons named in the replication, were, upon the 12th of August, 1688, aldermen and council men, under, and by virtue of, the said letters patent, in terms which necessarily involve that these were either the persons originally nominated in the letters patent, or that they had continued themselves, by election, to that day.

My lords, if instead of your lordships having the trouble of examining this record narrowly, and picking out admission after admission, from different parts of it, to eke out the defendant's case, the relator had, for some purpose of his own, introduced into his replication all those parts of the charter, and all those averments, the want of which are objected to the plea, I think he could not have afterwards objected, that the existence of the corporation, or the electors, or the body out of whom the election was to be made, were not well pleaded by the defendant; if he could not, the question is reduced, it should seem, to this short point—has he not in effect admitted the whole? if he has, the whole is upon record, and we ought to give judgment upon it in the same manner as if it had been regularly and formally pleaded.

We hardly want authorities upon a proposition so stated—but there is a class of cases which applies to this subject, some of them are of a very old date, long before the existence of the statutes of Jeofails.

I have traced them as high as the 6 Edward IV. I shall state a very few of them to your lordships; they relate to the question, how far a defective count, bar, replication, or other pleading, may be made good by the plea of the adverse party.

The first I shall mention is, the case of *Drake v. Cordery*, in *Croke, Charles*;—it was an action for slander. The declaration charged the defendant with having said of the plaintiff, that he was forsworn; the defendant justifies, shewing, that the plaintiff had taken an oath in the open sessions, and that that oath was false; upon which issue was taken, and the verdict passed for the plaintiff. Upon a writ of error from the court of Common-pleas, who had given judgment, it was objected,

jected, that no action lay for saying that a man was forsworn, and that no action would lie unless that false oath was in a judicial course, and would draw with it the pains and penalties of perjury; and so it was taken, that the law was; but the court affirmed the judgment, for they held, that if there was any doubt upon the pleadings, it was upon the declaration, which is uncertain; because he does not shew, that the word *forsworn* intended a false oath in a court of record; yet, says the court, when the defendant, by his plea, confess'd he spoke those words by reason of the oath taken at the sessions, that clears the question whereof he intended to speak; therefore that supply was added to the declaration, and it was exactly the same as if he had said in the declaration, "that he was forsworn," in a regular judicial course.

The same kind of reasoning is adopted in a case in 1 *Siderfin* 184, where the declaration (it was in trespass) stated, with great uncertainty, whether the thing taken was the property of the party who brought the action, or whether it was taken out of his possession. The justification stated, that the defendant had a right of way to a wood over the plaintiff's land—that he was stopped by the plaintiff, who struck at him with an instrument he had in his hand, upon which he took it out of his hand. They went to issue upon the right of way, which was found for the plaintiff.

It was moved in arrest of judgment, that the plaintiff had not shewn that the hook, which was the subject of the action, had been taken out of his possession; it was held by all the court, if the trial had been upon "not guilty" it would not have held; but here the defendant had, by his plea, shewn it was in the plaintiff's hand, and that he took it out, which aided the declaration.

In *Dyer* 15, in debt, on an obligation, the party ought to alledge the place where the obligation was laid from whence the venue may come; and if he fail, yet if the defendant pleads that the obligation was made by the duress of the plaintiff, now the count shall be good inasmuch as the debt is confess'd.

In *Comyns's Digest*, title *Pleader*, under the head—"When a plea shall be aided," he states this case, I think, not referring to the book whence it is taken—"A bad bar may be aided by a replication, as if the defendant in assize pleads a feoffment upon condition and entry, for the condition broken, without shewing the deed, as he ought; if the plaintiff replies, that after the feoffment and entry he re-enscoffed him, this confession in the replication aids the defect in the bar;" and he refers to a case in *Plowden* 230, b. of the same kind.

Under the title—"When a declaration shall be aided," he puts the case of a count in debt, for an escape or a commitment in execution, without saying, *prout patet per recordum*, which is bad; a plea of licence from the plaintiff cures this, for he admits the commitment; not in terms, but the defence supposes, and grounds itself upon the commitment.

My lords, I ought not to omit to state to your lordships, that Sir *Edward Coke*, in his comment upon *Littleton*, sect. 534, folio 303 b. states the rule of pleading somewhat more narrowly than I have done; he states, that when a count, bar, replication, &c. is defective in respect of omission of some circumstance, such as time or place, there it may be made good by the plea of the adverse party, but he says, if it be insufficient in matter it cannot be saved; he states the rule in the same manner in *Butt's case*, 7 *Rep.* folio 25; but that case certainly does not warrant the doctrine in the extent.

It was a case upon an avowry; the avowant avowed for distress in White-acre, for rent derived out of the White-acre; the plea in bar disclosed, that the true title was to distress in White-acre, for the rent derived out of Black-acre; and the book says, "and although the plaintiff in bar to the avowry, hath disclosed the whole truth of the matter in special, which in judgment of law makes for the averment, and hath made his case better for him than the avowant had made it for himself; yet that doth not make the avowry, which wants substance, good; for the avowry which

which is in the nature of a count, ought to contain sufficient matter upon which he may have judgment to have a return."

The defect in that case was not a defect of omission, the avowant had made a bad title to his rent; the plaintiff, in shewing it to be bad, had also shewed how he might have made another title, which would have been good, but that would not make his bad title good.

He repeats the same doctrine in *Dr. Bonham's case*, in the eighth *Report*, folio 107, but the case there does not at all turn upon that doctrine; and, therefore, it was not at all necessary to introduce that. It was a demurrer to an immaterial replication and a plea, which was a bad justification of an imprisonment, where, doubtless, the replication was immaterial, and judgment would be proper upon the insufficiency of the bar; and upon this principle, I have before stated, it is impossible to give judgment for the defendant, where a good cause of action appears, unless a good defence appear for him upon the record.

Sir Edward Coke also refers to the year-book of the 6 *Edward IV.* where the principal case was an action of contract. The defendant stated two articles, and averred performance, but did not say, that they were all; issue was on the performance, and found for the defendant; and the defendant insisted in arrest of judgment, that his plea in bar was bad; and one of the points was, whether as the defendant had not demurred, but had taken issue, he had not made the plea good.

In the conclusion of the case one of the counsel objects, "that according to this doctrine, if a plaintiff will reply to a plea in bar, he shall never have what they call *Joofail*;" on which one of the judges answers, "as to such things as are not material he may, by his replication, make a bar good, but not so as to other things;" and this passage is particularly referred to by Sir Edward Coke in support of his doctrine.

The particular cases cited in the year-book are certainly very intelligible; for they prove, that however material the objection, the party who confesses the matter of the plea shall not quarrel with the form of pleading it. The general doctrine, as stated by Sir Edward Coke, on the authority of this *dictum* of Choke, considered as general doctrine can hardly be made consistent with these cases; if it be understood with reference to another class of cases, it may be right.

There are cases where the mere pleading over, and putting the defence on collateral matter, has been held to aid defects of circumstance. (*Noy fo. 9.*)

Such cases do very substantially differ from the other cases, where the matter pleaded either expressly admits the case alledged informally, or goes directly in avoidance of it, upon a supposition that it is that which the other party should have stated it to be.

In the case now before the house, the prosecutor, in his pleadings, agrees, that there was that corporation in Chester, under the letters patent of Charles II. under which the defendant derives his title; he did endeavour to avoid that charter by other matter; and, my lords, it appears to us to be fit, that the record should be understood by your lordships as the parties have understood it, however informally they may have expressed themselves; and, therefore, upon the collection of the real case, as it stands upon the record, and upon the authority of the cases cited, we conceive that as to your lordships' first question, the matter of the plea, as the same stands admitted or found by the verdict, is sufficient to support the defendant's title to the office of alderman in question.

My lords, the second question is, "whether the matter of the replication, as the same stands admitted or found by the verdict, is sufficient to avoid such title?"

The last of the two special replications goes most directly to the foundation of the defendant's title, which is, the letters patent of Charles II. It states, "that King Henry VII. by his letters patent, under the seal of the county palatine of Chester, bearing date the sixth of April, in the twenty-first year of his reign, incorporated the citizens and commonalty of Chester." It states the manner of the incorporation with great particularity; but as nothing will arise upon the manner of

of incorporation, and I am unfortunately obliged to take up but too much of your lordships' time, I don't enter into the particulars. It states, "that these letters patent were accepted—that Queen Elizabeth, by her letters patent, under the great seal, being an *inspeximus* of the former letters patent, confirmed them, and gave additional powers for electing a mayor or sheriffs, in case of death; and those letters patent were also accepted."

It states, "that these several letters patent were, and each of them was, and did remain and continue, in full force, strength, and effect, before and until, and at the time of the judgment herein after next mentioned, being given against the said mayor and citizens; that an information was filed against the mayor and citizens, as of Hilary term, in the thirty-fifth year of the reign of Charles II. by the attorney general, charging them with having used and claimed, without any warrant, divers liberties, privileges, and franchises—to wit, to be in themselves one body corporate and body politic, in law, and in fact and name, by the name of the mayor and citizens of the city of Chester; and to plead, and to have sheriffs—to return writs, and to do all that appertains to the office of sheriffs, &c. &c. all which liberties they had usurped."

The replication further states, "that such proceedings were thereupon had in the court; that in Hilary term, the 35th and 36th of the King's reign, for the default of the said mayor and citizens in not appearing to answer, touching the premises, it was by the same court considered that the liberties, privileges, and franchises, in the said last mentioned information, should be seized into the hands of the said lord the King, until the said court there shall further order; that after the said judgment, after the making the letters patent mentioned in the plea, upon the 19th of October, 1688, King James II. by an order in council, directed, that all the officers whom he had appointed since the giving the judgment, should remove; and that there should be a bill prepared by the attorney or solicitor-general, for restoring the corporation, whose liberties had been seized by the judgment."

It states, "that by these letters patent, under the great seal, of the 26th of October, 1688, King James did pardon, remise, and release, to the mayor and citizens of the city of Chester, the judgment given against the said mayor and citizens, or against the said citizens, by the name of the said mayor and citizens, in Hilary term, the 35th and 36th of Charles II. upon that information before described."

It also "pardons all seizures and process thereupon had, and all forfeitures, pains, and penalties, by reason of the said judgment; and all claims and demands of the King to any liberties, privileges, or franchises, enjoyed by them before the said judgment; and it restores and grants to the mayor and citizens, all their liberties which they had before the judgment, and before any process upon the information, and that the mayor and citizens should be a body politic and corporate, by the name of mayor and citizens; and that the officers and ministers who were in fact in offices and places, at the time of entering the judgment, should take upon themselves and execute the same offices and places as they held and executed them before the rendering of that judgment."

The charter then goes on to "constitute and to restore to William Streete, who was mayor of the city of Chester at the time of rendering the judgment, the office of mayor—to Sir William Williams, the office of recorder and alderman—and to the several persons who were aldermen at that time, the office of aldermen—also to the sheriffs, the offices of sheriffs; to have and exercise their respective offices, in manner, &c. as they had them before the rendering the said judgment; it authorises them to do every thing that belonged to their several offices, as they held them before the judgment; and they were to assemble the citizens, and to carry on the elections in the usual manner; and generally, that all the officers shall have the same power and jurisdictions that they had before the judgment."

It states, "that the mayor and citizens accepted those letters patent."

There are then proper averments to identify the information and judgment; and

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it proceeds to aver, " that the said letters patent of King Charles II. by the said defendant, in his said plea mentioned, from and after the granting and acceptance of the said letters patent of the late King James II. herein before mentioned, did cease, determine, and become void and of no further effect."

To this replication the defendant rejoins, " that such farther proceedings were had upon the information, that afterwards, in the 36th year of the reign of the late King, it was considered by that court (the court of King's-bench) that the liberties, privileges, and franchises, in the said information specified, should be seized into the hands of the King, and that the said mayor and citizens be excluded and amoved therefrom; that the record of this judgment was lost, but that the judgment itself was in force."

And it then states, by way of conclusion from that judgment, " that the community and body politic of the mayor and citizens of the city of Chester, in that replication mentioned, became and was totally dissolved and destroyed long before the acceptance of the letters patent of James II. in the replication mentioned."

To this rejoinder of a final judgment, the prosecutor pleads and takes issue, " that there was not any record of such judgment."

It having been stated, that the record was lost, it became a matter to be tried by the country; it was tried by the country, and there was a verdict found against the defendant, " that there was not any such record of any such judgment."

My lords, the object of this replication is to avoid the charter of Charles II. by shewing, that there was a corporation already existing in Chester, under letters patent of an elder date, in whom the magistracy and government of the city, and many of the liberties and franchises granted by the charter of Charles II. were already vested; assuming it as clear law, that there cannot be two corporations existing in the same place, at the same time, with co-ordinate powers of magistracy and government, and with the same or with similar liberties and franchises; and, therefore, that the last letters patent must necessarily be void.

My lords, I think (if my recollection does not fail me) it was distinctly admitted in the argument at the bar, that the law is so; probably upon the authority of the case of the *King v. Pasmore*—the case of the corporation of *Helstone*—in the discussion of which case the judges of the court of King's-bench seem to have understood that to be the clear law of corporations; not as I take it as the result of former decisions, but as deducible from principles of public policy and convenience.

My lords, in the very nature of the thing, liberties and franchises of the same description cannot exist at one and the same time, in the same district, in different persons or bodies; for instance, the dean and chapter of Westminster, and the dean and chapter of St. Paul's, cannot both have felon's goods of all resident within the city of Westminster. On the other hand, some liberties and franchises may be concurrent in practice and usage; we have seen the justices of the peace in the county of Surry, and the charter justices of the borough of Southwark, exercising a concurrent jurisdiction; and it is very certain, that in many places such concurrent jurisdictions do, in right, exist and stand together. But, my lords, this concurrence of franchises sometimes is productive of considerable inconvenience; and, where the franchise is of a nature to produce either profit or pleasure to the owner, the concurrence must necessarily depreciate both; to him who came last into it, this will be *injuria sine damno*, but it seems otherwise to him to whom such franchise was first granted.

There are many instances of proceedings by *scire facias*, to repeal letters patent of liberties and privileges obtained *ad damnum alterius*; or an assize of nuisance lies, or an action on the case; and according to 2 *Ventris* 344, the subject has a right to use the King's name in *scire facias*, for the purpose of avoiding such patents, and to avoid multiplicity of actions on the case.

I, therefore, conclude, that not only the same liberties cannot be granted to the prejudice of prior grantees, but that similar liberties also cannot be granted.

In the information against the corporation of Chester, to be a corporation is called

called a *liberty* and *franchise*; if it be so, there can be no reason why the grant of it should not be subject to the same rules as the grants of other liberties and franchises.

There are certainly considerable metaphysical difficulties in the way of its being a franchise in a corporation, *to be* a corporation; it is certainly a liberty and franchise, however, to the individuals who compose the corporate body; and this, as it seems to me, is quite sufficient to give this rule of law a bearing upon the case; and that a corporation is not well created if it be to the prejudice of any other corporation or body. And there can be but little doubt whether the incorporating the whole body of the citizens of Chester (six or seven persons only excepted, who were members of the former corporation) into a corporation of the same nature with the existing corporation, was, in consideration of law, to the prejudice of the old corporation, when, according to Bracton (*tit. inquirendo*, fo. 56.) the law was, that even free warren could not be granted to one after it had been first granted to another. We think, therefore, that the foundation of this replication is solid.

I proceed to consider the principal parts of the superstructure upon it.

The first proposition to be maintained is, that there was a corporation, with powers of government, existing in Chester at the time when the judgment in the information was rendered.

It is objected, that the letters patent of Harry VII. are not well pleaded; that it is not sufficiently averred, "that there is a county palatine of Chester, and that the city of Chester is within it; and that there is a seal of the county palatine."

And it is further objected, that however this may be, "letters patent of incorporation cannot pass under the seal of the county palatine, inasmuch as the county palatine is in the crown, but must pass under the great seal."

These objections admit of a short, and, in our judgment, a satisfactory, answer.

The law takes notice of the county palatine of Chester, and that the city of Chester is within it; that it has *jura regalia*, and consequently a seal; and that the seal of the county palatine is at least concurrent with the great seal, in point of authority, to pass letters patent of incorporation.

My lords, I agree with one of the counsel who stated it at the bar, that in one stage of this cause, it was made a question, whether the county palatine seal was not the *only* seal which would pass letters patent—and whether the charter of Charles II. was not liable to an objection inasmuch as it was under the great seal only.

If it had been necessary to have averred the existence of the county palatine, it might have been very questionable, whether the averment included in the words, "under the seal of his county palatine," would have been sufficient; perhaps the title to be a county palatine must have been set forth; but the words, "under his seal," do sufficiently import an averment, that there was a seal, and that that seal was used.

My lords, I have searched, but without the least success, for the particular title by which the county palatine of Chester exists at this day, without merging in the *jura regalia* of the crown. We must take it, as I conceive, to be one of the ancient customs of the realm, and part of the common law, as such, in the same manner as the custom of gavelkind is in the county of Kent.

It would not be a very remote conjecture to suppose, that it was separated from the general *jura regalia* of the crown, by some act of parliament not now extant, in the manner in which we know the duchy of Lancaster was separated; but it is enough for our purpose to say, that we find it in a state of acknowledged separation, and that we cannot now shake the foundation upon which it stands, without overturning all that has been done for many centuries.

The fact of the existence of the county palatine of Chester may have been, and that of Durham I believe has been, sometimes pleaded; but I do not conceive that it was ever determined to be necessary, that it should be so pleaded; it is necessary that the jurisdiction should be pleaded as often as it is used to oust the general jurisdiction of the courts in Westminster-hall, because the jurisdiction of the courts

in Westminster-hall is general, and the parties may wave the jurisdiction of the county palatine if they should think fit, and in pleading the jurisdiction they may have also pleaded the existence; but that was not, as I conceive, necessary, because, of that the court takes judicial notice; they also take judicial notice of the courts in the county palatine, but they will not act upon that notice, except upon the requisition of the party who makes the requisition, by pleading against the jurisdiction.

I shall not trouble the house any further upon this, but to state, that it does sufficiently appear that there was a corporation existing in Chester, under the letters patent of Henry VII. and Queen Elizabeth, until and at the time of rendering the judgment.

I come now to the main point of the case upon which the judgment of the court of King's-bench has, I apprehend, principally rested—*What is the legal effect of the judgment on the information against the corporation of Chester, pronounced in Hilary term, the 35th and 36th of Charles II. upon the corporation then existing under the letters patent of Henry VII. and Queen Elizabeth?*

My lords, I feel here that I am going upon very untrodden ground; though I have taken all the pains I possibly could to inform myself—though I have had some assistance from a very ingenious work published by a Mr. Reeves, where the old law of the country has been collected and put together with great learning and with wonderful industry, yet I must still say that I shall stand greatly in need of the indulgence of the house.

I agree, in the first place, that this judgment is to be considered as a judgment of the court of King's-bench; it has the form of a judgment—"it is considered," is the proper language of a judgment, and not of a mere award of process; perhaps in a court of error, upon a writ of error to reverse that judgment, I should say, that it was void, and ought to be reversed merely because it was a judgment and not an award of process only; but I find it was a judgment.

My lords, I agree that it was a subsisting judgment, at least up to the time when the letters patent of King James attached upon it; and, my lords, by pleading this judgment, the prosecutor of this information has certainly brought upon himself the difficulty of maintaining, that it had no such effect upon the corporation then existing, as to clear the way for the introduction of the new corporation, under the charter of Charles II. or that at most the corporation, under the charter of Charles II. was in consideration of law (in the event which afterwards happened of the charter of pardon and restitution of King James II. having been granted to the old corporation) but a temporary provision for the government of the city, during a suspension of their capacity to act, created by that judgment.

My lords, this difficulty might have been avoided if a more simple, and I should have thought a more obvious, manner of pleading had been adopted; that is to say, if the replication had stated the charters, and that the corporation under them was in being at the time of granting the charter of Charles II. and had rested there, that would have driven the defendant to have pleaded the judgment *quousque* and final judgment, in which case the verdict, that there was no final judgment, would probably have put an end to the question; or if the defendant had thought fit to rely on the judgment *quousque*, the prosecutor might either have demurred, or he might have done that which he has done now by this replication, pleaded the charter of restitution, which, I conceive, would have been no departure from the replication, but an affirmation of it; in either of which cases each party's merits would have arisen upon his own pleadings, instead of upon his adversary's. But the prosecutor having introduced this judgment *quousque*, and probably for good reasons, though they don't now occur to me, he is to get rid of it as well as he can.

My lords, having agreed that this is to be taken as a subsisting judgment, with the qualification that I have before mentioned, I also agree that we are bound to presume, that all the process had regularly issued which could have issued, previous to this judgment, in order to warrant it.

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The judgment is, "that the liberties in the said information above specified, should be seized into the hands of the said lord the late King, until the said court there further order."

If we understand this judgment according to the letter of it, it is much easier to say what it is *not*, in point of legal operation, than to say what it *is*, or what it was meant to be. It is not a *final* judgment, for the court reserve to themselves to make further order if they shall think fit; it is not *perpetual*, for it is expressed to be only until the court shall make such further order; it is not a judgment upon the right of the King, for it *decides nothing*, and it expressly reserves the power of deciding; it is not a judgment against the corporation, for the same reasons which shew that it was not a judgment upon the right of the King.

But I go one step further, and I also agree, that we ought not to examine, too scrupulously, the terms of a judgment pronounced more than a century ago, not appealed from in the regular courie, and brought now under consideration in a collateral way; however harsh the proceeding in which it was pronounced, and however severe the use which was actually made of it, namely, to strip an antient corporation of all its liberties and franchises, and to annihilate its very existence, without imputing to the corporation a single abuse, or stating any one specific objection to its title.

I think I cannot consider it with more advantage to the defendant than by supposing it to be as full, as complete, and as perfect a judgment as the court could by law pronounce against the corporation in the actual state of the case. Now (to use the words of *Jenkins* in the case that was referred to at the bar) *I take it to be clear law, that no man shall finally lose his land, or his franchise, upon any default, if he has never appeared*; and that, with regard to franchises, the court have not authority to do more than to award seizure into the King's hands, *nomine districtionis*, and that this judgment can have no further operation than to put the King's hands upon the franchise, for the purpose of distress, without touching the right.

My lords, on the return of the summons on ejectments, the process called the *magnum cape*, might issue, which seized the tenement into the King's hands, in the nature of a distress; and ultimately the demandant might have judgment to recover the seizure of the tenement, which was the subject of the suit.

But, my lords, the *magnum cape* contained in it a second summons; and even after that second summons, and for default, the judgment that was pronounced was not final; for though there was a judgment that the demandant might recover the seizure, all the writers say expressly, that the tenant may recover back the tenement in a writ of right.

With regard to franchises, the proceedings in which they are called in question may be considered as sometimes in the nature of a real action, and sometimes in the nature of a mixed action.

The writ of quo warranto was the King's writ of right; the proceedings by information in the nature of a quo warranto, and the proceedings without writ, in the eyre, seem to me to partake rather of the nature of a mixed action. The course of proceeding in the *iter* was, public proclamation was made, that all those who claimed any franchise in that city, &c. should deliver in, in writing, a distinct account what franchises they respectively claimed.

Britton, in the chapter of the eyre, states, that these claims were to be received upon the first day of sitting, and to be enrolled; of which enrolment the sheriff was to have a transcript; that as to all such franchises as were not claimed, the sheriff should be commanded to seize them into the King's hands, in the name of a distress, and should be answerable to the King for the issues, until those who should claim them had saved their defaults for not attending the summons, and then they were to shew by what authority they enjoyed them.

From the same author, chapter *On eyres and franchises*, I collect, that there was likewise an inquest for every bailiwick, who were charged to inquire, among other articles, what persons claimed liberties, in order that those who had neglected to claim

claim might be proceeded against in the course before directed, or in some other course, that their liberties might be seized for non-claim. *Britton* states, that when the presentments were brought in they were to be pleaded in this manner, referring evidently to the very perplexed record in the statute of quo warranto, the 6 Edward I. "First, the claimants shall be ordered to appear on summons; and then if the summons be attested, and they make default, the franchise shall be seized into the King's hands, and the sheriff shall be answerable to the King for the issues, and so remain in the King's hands until the claimants appear and answer."

In practice, the usage in Edward III.'s time was (as I know with certainty from inspecting the rolls of the *Itter* office, which was in that year) that immediately upon the presentment coming in, without a summons, the franchise was seized; and it seems, very reasonably, because it was liable to seizure for non claim, upon the first day of the *Itter*, and all that the presentment was necessary for, was to ascertain the fact, that such claim existed, which the *Itter* could not know until it was in some way or other brought before them. The writ of quo warranto, as far as I can judge of the proceedings of the *Itter*, might always issue; in some cases the parties could not be put to answer without it. When the writ issued, the party was summoned to answer, at a day certain, at which day, if he made default, the franchise was also seized.

Britton, speaking of this default, says, "the franchise shall be seized into our hands, as above set forth" (referring to the seizure on a summons on a presentment, which I before stated, and says) "and so remain without any other summons, until our further orders; nor shall they even be permitted to replevy such franchises, if they do not forthwith answer our summons."

This course of pleading, as collected from *Britton*, corresponds with the course marked out by the statute of the 6th Edward I. as far as that statute goes; the fifth paragraph of the fifth section of that statute directs, "that if the party don't come in on the same day which is *ad primam assisam* (the first day of holding the eyre) then these liberties shall be taken into the King's hands, in the name of distress, by the sheriff of the place; so that they shall not use them until they come to answer before the justices, and when they do come in by distress, their liberties shall be replevizable if they demand them, in the which replevy they shall answer immediately, after the form of the writ afore said"—(meaning the proclamation; for there is no mention of the writ of quo warranto till afterwards.)

The statute mentions a writ of quo warranto afterwards, and states, "that if it be before the King himself, and the party does not come, such order shall be taken as in the circuit of the justices." What that order was I have stated from *Britton*. The statute goes on and says, "that if the King depart the shire (as I take it before the default incurred) they shall be adjourned into short days, and shall have reasonable delays according to the discretion of the justices, as it is used in personal actions;" so that the strictness of proceeding, which took place in real actions, seems not to have been in the contemplation of those who meant to frame a course of proceeding for the *Itter*, or for the proceedings in quo warranto, in the King's-bench. Your lordships know, without my reminding you, that in personal actions there never was such a thing as a final judgment before appearance; the statute directs, that the justices in eyre shall proceed according to these ordinances, and according as such manner of pleas ought to be ordered in their circuit.

Comparing *Britton's* account of the proceedings in the *Itter* with the statute, I collect, that the seizure was of the same nature, for default of appearing upon the summons of the writ of quo warranto, as upon the summons on the presentment, or for a non-claim on the first day; and was also of the same nature in the proceeding upon a writ of quo warranto, before the King himself, in the King's-bench, and in the proceedings before the justices in eyre. Of what nature it is in the proceedings by information, in the nature of quo warranto, unless it is fixed by analogy, I really don't know, nor really do I know how it came to be process in that proceeding, which is in the nature certainly of a personal action.

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Your lordships will observe, that the franchise was to remain in the King's hands till his further orders; that is, his *legal* orders communicated in the proper channel by his courts of law; it is a possession, therefore, only that the King has. There was no day prefixed to the party to come in and claim after the seizure, either before the King or in the *Itier*; but it is very clear with respect to the *Itier*—every body agrees, that the party might come in and might take his own time for coming in, at least during the eyre, whether he could or not come in afterwards.

There is no analogy between this process and any other, that I know of; it is a prerogative process of distress *sui generis*, far more operative than the *magnum cape* in its inception, because, according to *Bracton*, that was nothing more than what he called *simplex captio*, which did not interfere at all with the dominion of the tenant over the property; and he particularly instances, that if it should happen that during the seizure, where an advowson was seized, the church became vacant—the tenant should have it, and not the King; so that the distress of *magnum cape* was a slighter kind of thing, though it was more extensive in its consequences, yet in itself far slighter than this seizure of liberties under the prerogative process.

The proceeding upon the *magnum cape* certainly had more important effects afterwards; for there might be a judgment that the demandant should recover the seizure of the land, but that was not till after another summons, and, as I have already observed to your lordships, even that judgment was not final. Neither the seizure in the one case, nor the possession in the other, bound the right, but the question upon the right was still open.

My lords, though this appears to be in the nature of this process, seizure *nomine districtionis*, one cannot readily collect how it should possibly extend itself into either process or judgment that could bind the right; and one does not readily conceive how the right should be bound without some process of judgment; yet I must admit, that it is stated in the case of the market, in 15 Edward IV. by *Nele*, one of the judges, "that at the common law, before the justices in eyre, if the party was summoned and came not during the eyre, he should forfeit his franchise for ever." And one of the counsel stating the same idea with more particularity, says, "I say, that before justices in eyre, if the party who hath the franchise, come not, then the franchise shall be seized into the King's hands, *nomine districtionis*; and if the party who ought to replevy the franchise, come not, during the eyre in such county, he ought to forfeit the franchise for ever; and so (he said) it happened in the eyre in Kent, and, therefore, *Herby*, then justice in eyre, said, come the party fitting the eyre, or otherwise he has lost his franchise for ever;" he makes, in his manner of putting it, no sort of difference between the consequence of not coming after a seizure for non-claim, and the consequence of a seizure for default of appearance after a summons; I believe he was right in that, for I don't know that there is any foundation for making the difference.

They say, "the party shall forfeit his franchise;" it is not, I presume, by virtue of this seizure, for that which was process of *distringas* originally, could not change its nature, and become final judgment upon a right in consequence of the party's not coming in during the eyre; but *Herby* tells you, that all this must mean that the party should never be permitted to replevy afterwards, and as by the rule of the eyre, he must replevy before he could claim, he could never claim because he could not replevy, and so in an indirect way he shall lose his franchise.

My lords, where the mere seizure (short of forfeiture or any judgment upon the right) was lost by judgment upon the return of the *magnum cape*, the writ of right lay for the tenant, who might by that writ have all the proceedings overturned, if he could shew he was not summoned, or even that he was not summoned the *second* time after the *magnum cape* had issued; for it was stated to be the custom of England, that he was to have an *additional* summons to remind him of the danger he was in, and to call upon him to answer both the principal plea that was depending, and also for the defaults he had before committed. It would be very strange
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and anomalous if in a proceeding in a writ of right, as this proceeding upon a writ of quo warranto was, the party shall lose his right in that very intricate way, in which only he could lose it, without judgment, and without any summons, after the seizure was first made in conformity to the proceedings upon a *magnum cape*! I do humbly conceive, that the law of the *Iter* was not so; and that nothing short of forejudger barred the right for ever. And though Sir Edward Coke has too hastily, in my judgment, adopted this doctrine from the Year-book of the 15th Edward IV. he has himself furnished me with an extract from the Year books of *greater antiquity*, and I apprehend a much better authority, which goes a great way indeed to prove that he, and that those who decided that case (if it was decided) in the 15th Edward IV. utterly mistook the law. It is a case from the Year-book of the 2 Edward III. and it is cited by him in his report of the case of the *Abbot of Strettham*, &c. 9 Coke, 28 b. It was in error in the King's-bench, upon a judgment of forejudger, in quo warranto, before justices in eyre: the judgment was reversed for two reasons, which Sir Jeffry Scrope openly declared, "First, that justices in eyre may be mistaken in ousting the defendants of aid, where the aid was grantable. Secondly, that they have forejudged the defendant of the franchise, that is, to forfeit the franchise for ever; for (says Sir Jeffry Scrope) in some cases the franchise ought to be seized into the King's hands, and in some cases seized, as in his right, till the party has made fine—and in some cases shall be *forejudged*, but forejudger holds for ever;" a strong inference that seizure in right of the King, or seizure into the King's hands, which evidently means *nomine districtionis*, did not hold for ever; "and, therefore (says Sir Jeffry Scrope) we see by this record that the justices ousted the defendants of the aid where, by law, aid was grantable; and further awarded, that they should be forejudged of the franchises, because they would not otherwise plead, but held themselves to the aid where, for want of pleading, the franchise ought not to be forejudged, but seized, although the defendant's answer had not been sufficient."

Now, my lords, here are the seizures *nomine districtionis*—the seizure in right of the King—and the final judgment upon the right, clearly and distinctly marked out. I believe I may venture to assure your lordships, that this line may be traced through all the cases in the *Iters*, which I have seen, and many of which are to be found in *Keilway*—two are upon the roll of the *Iter* of *Nottingham*, the 3d of Edward III. which consists of twenty-eight rolls of parchment, very closely written, and which I have very carefully examined. In the very first case in *Keilway's Iter*, claim had been made of wreck, as appendant to a manor; for the crown they say, "the manor has been in the King's hands within time of memory, and this destroyed the appendancies;"—a day over was given—(therefore this is a case *after appearance*—a much stronger case than that sort of default which arises from not appearing—a day over was given)—when the defendant made default; upon which he was warned to hear judgment, and the franchise was seized into the King's hands; and all this was certified into the King's-bench, into which the proceedings in the eyre were frequently adjourned.

I stay here for a moment, to remark, that there was a process by which, where they wished to proceed to judgment on a default after appearance, they could do it; for here, after the seizure into the King's hands, they warned the party to appear, which would be much nearer to the case of the *magnum cape* than the common proceedings. When they came to the King's-bench, it was then insisted, that the party having made default after appearance, he had forfeited his franchise. "It is not so (says the chief justice) but he shall be fined and suffered to plead; and there is a diversity between replevin and fine; for replevin lies where the franchise is not claimed in time, and fine lies in the case *ut supra*, and other like cases." And afterwards a fine was assessed, and the party pleaded the prescription in his answer.

I believe this is the only case (I don't recollect that there is another) in which even the counsel argued, that a forfeiture was incurred by reason of the not appearing, or not making claim at the last eyre, either upon mere non-claim, or having made

made default of appearance in the last eyre, and not appearing during the eyre.

In the eleventh case in *Keilway*, fo. 141, the *Prior of Suffex* made fine for his non-claim in the last eyre. In the fourteenth case, *Aldenham*, who acted as attorney-general for the King in the eyre, states the effect of non-claim and seizure after the determination of the eyre, in this manner:—"Upon every non-claim the King is entitled to have the profits till they are sued out of his hands, and the parties' occupation, for all the intermediate time, is tortious upon the possession of the King;" and he illustrates his argument by putting this case, "if the King's tenant, *in capite*, die, and his heir enters and continues in possession even for twenty years, and afterwards this is found by record, he shall answer to the King for the mesne profits; so in this case." And it was a very good illustration of the proposition, that the mesne profits should be answered to the King; it would have been a miserable illustration of the proposition, that he was to forfeit any thing; for the heir in that case did not forfeit his land; but the profits he did forfeit, till he had regularly replevied his lands out of the hands of the crown; then *Scrope* gave the rule, "that the defendant should be pleaded with as if he had claimed in the last eyre."

In the discussion of that case *Scrope* said, "that non-claim is not so prejudicial as if the franchise is lost in the right, but is a trespass." This seems to me to be the true nature of the effect of not claiming; every man is bound to make his claim; if he does not he is considered, from that time, as a trespasser upon the King—the rights are suspended, and no consideration is had of it, but there is a *trespass*, for which there is a *seizure*, and for which the profits may be answered to the King without touching the right.

In the sixteenth case in *Keilway* (the *Abbot of Selby's* case) the counsel for the crown objected that the liberty had been seized at the last eyre; the Abbot answered, "that his predecessor had claimed in the last eyre, and that a quo warranto had issued against him, that he came and pleaded, and had a day over; at which day he came not; and that, therefore, the franchises were seized into the hands of the King, in the name of a distress, and he prayed to be at liberty to replevy the franchise." Sir *Jeffry Scrope* said, "a franchise seized for non-claim ought to be delivered by replevy, but it is otherwise if it be seized by judgment;" they perfectly understood what that meant—the counsel immediately say, "we desire to be admitted to a fine;" a fine was assessed and the claim proceeded. The sum of the objection was only that he could not claim till he had fined, not that default worked forfeiture.

In the thirty-ninth case, the King was permitted to have the issues as well as the fines. It seems to me as if, in the proceedings in *Iter*, commonly the issues not being very large, they awarded a fine which bore some proportion to the profit which had been made, and they took it rather in the shape of a fine, than taking the trouble to have the issues particularly answered; but in that particular case they did direct the issues to be answered to the King; and Sir *Jeffry Scrope* gave a particular reason for it; he says, "you don't shew how the franchise came out of the hands of the crown; it was seized into the King's hands, and he had got in possession after that seizure; we award that the King have the issues." *Scrope* proposed then to have an inquest to settle what those issues were; but they were taken by agreement at a certain sum; he paid those issues; having paid his fine, then the claim proceeds.

In the twenty-eighth case, *Scrope* is said to have awarded that the party should enjoy his franchise (of frank pledge probably) but that he should be in the King's grace because he had no pillory or tumbrel; it was considered as a species of abuse in those who had certain liberties of frank pledge (the correction of the assize of bread and beer) if they had not what they call a jodfelly, by which the parties might be punished, as by law they were liable to be punished, for the third offence, by corporal punishment; they got nothing by putting a man in the pillory, and, therefore, it generally happened that they often got into that scrape. In this case they

they immediately fine for the franchise being delivered back again, they undertaking to use it better for the time to come.

When the franchise was replevied during that eyre, the language was this, "*predictus usus capiatur in manus domini regis.*" If the franchise was forfeited, then the language was in the true regular form of judgment, *quod amittat libertatem*, or, *quod abjudicetur*; so that there were all these regular forms of proceeding which Scrope lays down in that old case, in Edward III.'s time, upon the writ of error, of seizure into the King's hand—of seizure in the right of the King redeemable by fine—and of forejudger; and it is wonderful to see how exactly the proceedings in the *Iter* conform to that idea, with hardly a single variance. One variance there is—it was, that where they meant that the liberties should be taken from the party, and yet that there should not be an absolute forejudger, which amounted to a forfeiture, and would perhaps annihilate the liberty; they seized it into the King's hand, and they delivered it back again to the party *pro ratione* (that is) he paid a rent for it to the crown, and was to have it as long as the crown thought fit, and in that way they seized a liberty which seemed to be forfeited; but in any other, where the liberty had been forfeited, they gave a judgment of forfeiture.

Upon the whole of the cases, as far as I have had an opportunity of inspecting them, there appears to me to be no difference between the replevy of franchises seized *nomine districtionis*, during the *Iter*, and after the *Iter*, but this, that the replevyn, during the *Iter*, is *de jure* and *gratis*; whereas the replevy, after the *Iter*, was also *de jure*, but it was upon a fine to be awarded by the court, and subject to answer, in some cases, for the intermediate rents and profits; and I find no case in which the party has lost his franchise, even where the default for which the seizure was made has been after appearance, which is a much stronger case than the seizure for non claim and for not appearing upon the summons.

The case I have cited of the Abbot of Selby is express, that forejudger cannot be in that case, which I consider as conclusive as far as analogy between the proceedings in the eyre can conclude, and proceedings in information in quo warranto, that the judgment given against the corporation of Chester, could be no more than what it imports to be, a judgment of seizure *nomine districtionis*.

My lords, it seems to me to be enough to condemn the doctrine laid down in the 15th Edward IV. of forfeiture being incurred in that case, that the court shrunk from its own principles; for after agreeing, as it should seem, that, by analogy to the rule of the eyre, a forfeiture had been incurred by the defendant in the case before them, they pronounce a judgment *quousque*.

How it should happen that the judgment was in fact entered in that manner in that case, if the entries upon the roll do really relate to the same case (as there is all the reason in the world to imagine they do) can only be surmise. Billing's reason for forfeiting the franchise, "*because otherwise the King cannot have any effect of his suit,*" certainly appears to have great weight—the reference by the statute to the proceedings in the eyre, and the supposed course of proceeding there—that is, if the party come not sitting the eyre, he lost his franchise for ever, shews they understood it so. It seems to me, that their argument all tends to induce forfeiture and final judgment; why the final judgment, therefore, was not given, it is not easy to imagine; but after the court are understood to have agreed that the market was forfeited, and, therefore, the judgment ought to be final.—Billing starts another question.

My lords, if I may presume to say so of men of great learning and talents, and who lived much nearer to the time when this proceeding was in use than we do, I cannot imagine that those judges did perfectly understand the subject they were upon; for in the proceeding by writ of quo warranto, as this was, I don't apprehend (speaking with diffidence and deference to those opinions) that there could be a judgment of *capias pro fine*; I take it that the defendant who comes in, is in the nature of a plaintiff; he makes his claim—if he fails in making good his claim, there is no judgment of *capias pro fine*, but the judgment is *quod sit in misericordia*.

cordia, &c. They enter into a debate and consideration, whether there shall be a judgment *pro fine*; *Catesby*, one of the judges, says, "there shall not; for it may be that the party hath good right to this market, and so hath done no wrong to the King." Assimilating it to the case of a tenant in a *precipe quod reddat*, he says, "if a tenant in a *precipe quod reddat*, makes default upon default, so that the demandant hath judgment to recover, yet the tenant shall not be amerced" (that is exactly agreeable to the idea of *misericordia*) "for no default can be adjudged in the tenant; so here, if no wrong can be adjudged in him who claims the market, there is no reason for granting a *capias pro fine*."

Coke says, "If we say the judgment is right, then a *capias* shall issue; for the judgment shall be accounted like the case of a trespass confessed, in which there shall be a fine." The pursuing a proposition through all its consequences is a good test of the truth of it. *Coke* reasoned very right, though his principles were wrong; supposing that there could be no *capias pro fine*, yet still, taking it that there might, he reasoned right; "if you mean that there should be a forfeiture here, it confesses the trespass, and, therefore, there ought to be a *capias pro fine*." Might not *Coke's* observation have led the judges to reconsider their original opinion, and the grounds of it, and ultimately to have changed their opinion upon it, and to have pronounced the judgment in the form in which it now appears? for it is impossible to reconcile the form, in which it now appears, to the reasoning.

Here the entry upon the controlment rolls becomes to be of very material consequence indeed, in my judgment. There is an entry upon the controlment rolls of subsequent process, both of *venire* and *distingas*, continued home to the death of the party.

This suggests some other observations:

In the first place, this entry does not leave us at liberty to suppose, that by possibility, the judgment which the court intended to pronounce, was entered erroneously; they could not have intended to pronounce a final judgment in a case where they go on to issue process to compel appearance; the issuing further process is perfectly inconsistent with final judgment, but is perfectly consistent with a judgment *quousque*, understanding that judgment to be a regular award of process in the nature of distress.

My lords, this entry upon the controlment roll also suggests a doubt, whether there is so much weight in *Billing's* reason for making a default work a forfeiture, as was supposed, viz. that otherwise the King cannot have any effect of his suit; that seems to be a reason that made some impression; if the proceedings were to close there, and by no possibility the King could go on, it seemed to be a reasonable thing why, in that stage of the cause, the King should have the effect of his suit by some judgment or other. If, after a liberty is taken into the King's hands *nomine districtionis*, process may still go on against the party to bring him in, either for the purpose of forejudging the franchise, or of having a decision and amercement if a false claim, or for any other purpose that can be imagined; it is not true as is alledged in the case in the 15 Edward IV. that the process was determined by due course of law, and that nothing was to be done after the *venire facies*.

The counsel for the defendant, in my apprehension, did not succeed at all in their endeavours to explain away this entry of the subsequent process upon the controlment roll.

There is an appearance of great regularity and precision in the entry. I must give credit to the roll for the process issuing, and I think it is very apparent for what purpose it was issued—that is to say, to compel that appearance, which the seizure had not effected, and if there could be no forejudger of the franchise before appearance, this process was the necessary means to obtain the effect of that suit.

There is a very obscure passage in *Britton*, in his title, *Franchises*, which seems to relate to process after seizure in the eyre—the French is very obsolete, and I cannot very well undertake to give a regular translation of it; I can only, therefore, give the effect of it; and my way of understanding it corresponds with a translation

tion of it by Mr. *Kellam*, and, I suppose, is not far from the truth, and possibly the entry upon the controlment roll may not be, at this distance of time, a very bad practical comment upon it.

I will state it to your lordships from *Kellam's* translation;—I have already had occasion to mention, that the first part of this chapter directs the inquests of the several hundreds and wapentakes to present all claims of liberties, and it directs what is to be done, if the claimant does not appear; it goes on thus, “and if those who make such default” (that is, the default for which the liberty was seized) “have, of their own wrong, usurped such franchises upon us, our will is, that they shall be distrained on in such manner as shall be mentioned in the chapter concerning attachments in trespass and in debt.”

The manner of proceeding in trespass and in debt is distinctly marked out in the very same author—that they are to proceed by distress—there is a course of distress pointed out, and if there is no land, they are to go on even to outlawry; if there is land it is ultimately to be seized into the King's hands, but a great variety of process runs out.

It says, “if they cannot clear themselves in court, from the personal wrongs committed against us, to our disinherison, let it then be awarded, that we recover the franchise, and that they be disinherited of the value thereof, or be in our mercy.”

The whole of the section is plainly founded upon the statute of the 6th *Edward I.* and, in some parts, very little more than a transcript of it; but there is nothing in the statute, undoubtedly, of this direction for a distress; whether, therefore, *Britton* was the author of the doctrine (for he writes in an authoritative style, as if in the name of a prince—as if he was issuing edicts)—whether the doctrine is founded upon the statute, and carried farther than the statute, into practice, I don't know; or it may possibly happen that there may be an error of the press, though the difficulty of ascertaining exactly, from manuscripts, what the passage really was in *Britton*; whether the true sense of it may be, as I have stated, I cannot undertake to be sure; it is a very material passage, for it shews, that after seizure into the King's hands, there may be a *disfringas*, and they may go on to the full effect of the suit.

Proceedings in the eyre are directly analogous to this very course of proceeding, which did prevail in this case, in *Edward IV.'s* time; though certainly the whole of it is perfectly inconsistent with the argument as found in the Year-books, both of the counsel and of the judges, in that case.

My lords, I think myself warranted to conclude upon the whole of this part of the argument, not only, *that the judgment against the corporation of Chester does not import a forfeiture or forejudger—but that no FORFEITURE or FOREJUDGER was incurred in the actual circumstances, or COULD HAVE LAWFULLY BEEN ADJUDGED UPON THE DEFAULT WHICH IS STATED IN THESE PLEADINGS.*

My lords, the question still recurs, what *was* the effect of this judgment; for I have rather hitherto been employing myself to shew what *was not* the effect; but having employed some time in that, will, I think, lead us to what is the proper effect.

It was objected, that this judgment could have no operation at all, being but an award of process, not followed up by an actual execution.

It was answered at the bar, that by force of the judgment, that the liberties *should be* seized, they *were* in the hands of the King. It is certainly true, that where the right of the King is found by matter of record, adjudged possession in law follows, and the adverse possession in fact becomes usurpation upon the King. But with regard to award of seizure *nomine districtionis*, as contra-distinguished from seizure in right of the King, it seems to me to be clearly otherwise; and the statute of quo warranto says, “the liberties shall be taken into the King's hands, by the sheriff of the place”—and so says *Britton*; and in *Kilway's Iter*, the seventh case, the court award, “that the sheriff shall hold the view, and take the other franchises, to the use of the King, and answer for them in his accounts in the Exchequer.”

In

In the twenty-seventh case, *Scrope* gives the judgment, that "the franchise should be seized, but the execution of the judgment shall cease till the inquest shall be tried upon the collateral point." If the rule be right, that the judgment executes itself, it is nonsense to say, that the judgment shall be pronounced, but the execution of the judgment should cease.

In the fourteenth case, in assessing a fine for a non-claim in a former *Iter*, *Scrope* says, "the officers of the King made no seizure, though there was a non-claim; so that neither you nor your predecessors made any entry upon the possession of the King; but if the King had had seizure, and you had entered upon the possession of the King, your fine should have been greater."

And in the case of the *King v. Quadryng*, the 15 *Edward IV.* there was a writ to the sheriff to seize, which appears to have been regularly returned; from all which it does seem to me as if there ought to have been a writ to the sheriff.

But I think, that your lordships ought not to lay any stress upon that circumstance, that is, a writ to the sheriff not appearing upon the record. If such writ was necessary, I think we ought, in this case, and after this great length of time, to presume, that there was such a writ, though it was not returned.

What then will the effect of this judgment be? I conceive, that its operation, *in law*, corresponds exactly with the effect, which I conclude, from the language of the charter of James II. it had in point of fact; that it laid the King's hands upon the franchise of being a corporation, and upon the other franchises in the information, so that the corporation could not use their liberties; the action of the vital powers of the corporation was *suspended*. The corporation being reduced to this situation, I think there can be no doubt but that a *custos* might have been appointed.

As a matter of history it is well known, that London, which is a corporation by prescription, was frequently under the government of a *custos*, and sometimes for many years together; had a *custos* been appointed, there could have been, as I conceive, no doubt but that the corporation, in consequence of the charter of pardon and restitution, would have resumed their liberties, and have gone on in the same manner as they would have done if there had been no interruption or interval, during which the corporation had remained in a torpid state. I conceive this must have been the case with London, otherwise the prescription would have been interrupted, and the constitution of the corporation would have been destroyed.

In the *Iter* of *Nottingham*, the liberties of the Vill of Nottingham were seized into the King's hands (one of those liberties was to make a mayor) they made their peace with the crown, and they got a charter of pardon;—I should have mentioned that upon their being seized, there was a commission issued to certain persons, giving them the custody, during the time that the liberties should remain in the King's hands; the corporation made their peace—they produced their charter of pardon—and *that* same mayor and burgesses, whose liberties were seized, and who were the original parties in the quo warranto, resumed their offices.

Instead of a *custos*, the crown introduced into Chester another corporation, by charter, to whom the custody of the city was committed, and to whom liberties, either precisely the same or similar to those which the old corporation had, were also granted. This was certainly to the prejudice of the rights of the old corporation; and upon the grounds of argument already stated (except as to the custody) this charter was void, as against the right of the old corporation. For a time indeed the old corporation were not in a condition to shake off their *custos*, or to assert their rights; but upon the principle before laid down, they were always entitled to have redeemed their liberties, upon a fine to the King for their default.

It so happened, that the necessities of the times stood for them in the place of a sum of money—and by virtue of the charter of pardon and restitution, the King's hands were removed; and (if I may so express myself) recovered from their torpor, they became in a condition to exercise their liberties; and consequently it should seem that the power of the new corporation, as *custos*, must necessarily cease, and to every other purpose the letters patent become void and of no effect.

It

It has been said, that admitting for argument sake, that the judgment *quousque* could only suspend the activity of the old corporation, yet that inasmuch as it thereby became, by its own default, unequal to its functions (those of magistracy and of government in particular, for which the King is bound to provide) the King might lawfully interpose a new charter; and that a new charter once granted, the King, upon the principle before laid down, could not afterwards restore the old corporation to the prejudice of the new one.

The weight of this reasoning will depend very much upon a question which has been touched upon before; that is, whether the proceedings in the information were closed by the seizure, so that the King could have no other effect of his suit, or whether process might have gone on against the corporation, to compel them to appear and proceed to final judgment. If the process could go on, as we have seen that it did go on in the case of the *King and Quadryng*—and as I judge it would do in every other case of an information that could be stated; there was no colour for a perpetual establishment of a local government, during the mere suspension of the right of local government in others.

There would have been no absolute necessity for it, even if the proceedings had closed; but upon what principle could this stand? the King could have no more than the possession of the franchise, and the perception of the profits (if any) in consequence of the seizure, so long as the liberties remained in his hands—the King could not alien those liberties—should it be lawful for the King to destroy them by an indirect alienation? *Bracton*, in his chapter *de acquirendo*, &c. seems to me to have put this point also upon its true ground. “*Amisiverat*” there, means *by judgment*, and goes to the *right*, and not simply to the possession; and “*restituentur*,” in that case, operates as a new grant just as much as a charter of pardon and restitution of a forfeited estate to a person attainted, or to his family, would do; and it would have exactly the same effect as such a grant would have had if made to the prejudice of an intervening grant; the old right in both cases is extinguished by the judgment—in both cases the grantee takes a new one.

The anxiety of those who drew the charter of James II. (the tradition is, I believe, that it was drawn by Sir William Williams) led them to go far beyond the mere replevy of the franchise; it is a charter of grant as well as of restitution—as a new grant I agree perfectly, that it cannot operate to the prejudice of the charter of Charles II. but as *restitution* only by this instrument, it is really *nothing more than delivering back, into the hands of the owner, his property*, which had been taken as a pledge for a special purpose; and this was merely collateral to the grant of Cha. II.

The difference, in point of consequence, between the one and the other is this, that as soon as the charter of King James passed, and the different rights of the two corporations were brought into competition, in the one case the title of the corporation, under the letters patent of Charles II. would be a posterior title, and in the other case it would be the elder title; *that* would make all the difference between a bad title and a good one.

I believe, that the law and the fact, in this case, correspond exactly. If your lordships could go out of this record to inform yourselves what was done upon the granting of this charter of restitution—what became of the mayor and the other officers, under the charter of Charles II.—what became of the charter itself for the next forty years—and when it first saw the light afterwards, your lordships would be, I am persuaded, satisfied of what I say.

Without going out of the record, or borrowing at all from the fact, we conceive, *that the matter of this replication, as the same stands admitted and found by the verdict, is sufficient to avoid the defendant's title to the office of Alderman.*

My lords, many other questions (some of them of the very last importance) were agitated in the course of the argument—such as, whether a corporation *can* be dissolved or forfeited by judgment? How a suit for that purpose is to be instituted? Whether the power of amotion, in the charter of Charles II. be general or limited,
and

and what that limitation is? Whether taking it as general or as limited, it would be a void power or a valid power? and if void, whether it would or would not avoid the whole charter?

We have taken all these difficulties into consideration, but I am not prepared to say that we have agreed upon an opinion to be offered to your lordships upon them. We are apprehensive, that as to some of these questions in particular, any opinion we might offer, might have an influence upon other corporations, and tend to disturb the peace of them; as we are prepared, without resolving these questions, to submit an answer to your lordships upon the two questions you have been pleased to propose to us, we have not thought it prudent to ask of your lordships any opportunity for the further investigation of the others.

J U D G M E N T.

THEN the *Lord Chancellor* left the wool sack, and after a short preface, moved their lordships, "That the judgment given by the court of King's-bench, in this case, be REVERSED, and judgment entered for the King."

Having returned to the wool-sack, his lordship put the question upon the said motion, which was agreed to NEM. CON.



A P P E N D I X.

No. 1.

NOMINA viginti quatuor Aldermannor. infra civitatem Cestriæ tempore Thome Smyth senioris Majoris Civitatis illius—Thome Smyth junioris Mercatoris & Roberti Wright Vicecomitum ejusdem Civitatis a die veneris prox. post festum Sancti Dionisij anno Regni Regis Henrici VIII. post conquestum Angliæ septimo usq. idem festum tunc proximè sequentem, viz. *p. unum annum integrum.*

Thome Smyth Major
Ricus Sneyde Recordator
Thomas Barrow
Ricus Godeman Armiger
Ricus Wright
Thomas Thornton
Thomas Hawarden
Willus Rogerfon
Johes Rathbone
Edmundus Farrington
Ricus Grofvenor
Ricus Lowe
Ran. Smythe
Willus Sneyde
Hamo Godeman
Willms Davidson
Rob. Barrowe
Edmundus Smythe
Ricus Walton

Qui onus Majorat. Cit. Cestriæ occupaverunt ac Custod. pac. cit. predict. Justic. pac. Cit. predict.

Qui onus Vicecomitis Civitat. Cestr. occupaver.

On the following side of the same leaf, are the names of 19 other persons, members of the common-council.

In the next page,
Eastgate-street.

Nomina xl Civium de Conimuni Consilio Civitat. Cestr.

Here are inserted the names of eight members.

Bridge-street.

Here are inserted the names of eight other members.

No. 2.

Liber Decret. & ordin. capt. in Secio Cestr. &c.

Marcius 1573 A^o. E. xv^o.

xxviiij. die, A^o. pd. — eod. die & A^o.

Intr. Dna. Rna. et Rgrum Lea Ma. Civits. Cestr. et Io. Starkie, Ald. Def.

AT which daie the saide def'ts app'd in this corte and praied Daie over to answer the enformacyon against them exhibited on the Queene's Ma'tie's behalfe; Daie is therefore given by this Corte to the saide def'ts to answer the same the iiijth daie of April nexte comynge; And for divers causes this Corte sp'ially movinge, the said def't Roger Lea now Maior of the said Cytie is enjoined upon the payne of c.l. to be levied to her Ma'tie's use that he in the mean tyme doe not p'cure or cause any

A P P E N D I X.

any elecⁿ to be made of any Aldermen or others of the coⁿ council of the saide Cittie contrarye to the poynte and lymytacon contained and expresse in the Chre of the late K. H. the vijth touching the saide election menconed in the said bill and informacion.

No. 3.

22 June 1573.

FIRST where there hath byn information given into the court of Exchequer of Chester by the Queenes Sergan there touching the election of Aldermen within the city, for that they be elected by the Maior and Common Counsaile without the Commonalty, the Charter limmitting the same by expresse words unto the Maior and Commonalty, the Earle of Leicester Chamberlayne of Chester doth think it convenient to refer the deciding thereof to the order and judgment of law, not doubting but the Maior and Citizens will have dew regard unto the effect of their Charters and libertys in that behalfe and to foresee that no tumult or other disturbance arise thereupon, which if it happen, the sayd Earl entendeth to take such further order as the good peace and quiet of the citty may be kept without offence or breach of the charter or libertys in that behalfe, and that such disorder shall be examined reformed punished and ordered before him as Chamberlayne or his deputy according to the demeritt of the cause.

No. 4.

16 Aug. 1573.

AT an assembly holden in the common-hall, before said Roger Lea mayor—reciting the said order of the 1st of April last, and that chief matter in the information therein mentioned was, the mayor pretended, contrary to the effect of their charter, to elect aldermen and common-council, viz. by the mayor and common-council of the said city, where the charter limiteth the same to be by the mayor and citizens; and the effect of which said answer was, that by sufficient warrant by the said charter and the usage, the same were and lawfully might be chosen by the mayor and common-council; and that the choice so to be made, was a better manner of chusing the said aldermen and common-council than the other. And whereas at this assembly, — Harry, alderman; Richard Massey, Robert Brock, Thomas Lyneall, Thomas Burgefs, Thomas Fletcher, Roger Bryne, and Anthony Hankey (amongst others) have, in open assembly, been charged that they should, contrary to their said first agreement and assent, and which was to send up the mayor and others, the citizens, with complaint to the right honourable the earl of Leicester, how they were, for their orderly proceedings in that manner of election, called to their trouble, and charged to answer their proceedings, before William Glazor, his deputy in the Exchequer; that their hands are subscribed to a certain petition directed to the said right honourable the earl of Leicester, requiring to have the choice of their aldermen and councillors left to them, according to the words of the charter, viz. to the mayor and all the citizens; neither regarding the other clauses contained in the same charter, neither the continual usage, neither the utter subversion of the state of this city, if the same should take place contrary to their former order and agreement, to the hindrance and defacing of the mayor and city's proceedings. And whereas they have every of them been severally called to answer this their manner of contrary dealing, in causes of such importance, have every of them either so wilfully or simply answered, as the same council think, for that their untrue dealing contrary to their own assent, they and every of them worthy to be utterly disfranchised from the freedom of this city, and never hereafter to be received as worthy members to enjoy the benefit of the said liberties, especially to be of the counsel of this city; yet, nevertheless, the said mayor and council do protract and respite the final order to be taken for any of their several disfranchisements, until the assembly next to be holden within the said city, with contentment, that if in the mean time, they, or any of them, shall deliver to the mayor in writing, subscribed with their names, a plain and simple declaration of the true cause that moved them so to subscribe the same,

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same, by whose procurement, and upon what occasion, acknowledging their offence in their so doing with submission, to the mayor and whole council, to stand to what punishment or fine the same shall take, touching their said misbehaviour, and with protestation never in the like, or in any thing that may tend to the prejudice of the liberties of this city, to be deviser or partaker with others: that then the mayor and council, upon such submission and the trial, whether the same be simply or feigned, to stay their said disfranchisements, with putting them to such punishment, by fine or otherwise, as to the same mayor and council at that assembly, upon due consideration of the said submission, shall think most requisite and convenient.

No. 5.

To our trustie and welbeloved the Maier Aldermen and Burgeses of our Citie of Chester.

James R.

TRUSTIE and welbeloved we greet you well. Whereas we are informed that the Office of Recorder of that our Citie of Chester is nowe voided forasmuch as wee desier to have such places of truste conferred upon such as are known to be sufficiente and well able to do both our uses, and you of that Corporation such services as shal be incident to that office And beinge well informed of the sufficiencie of Hugh Mainwaring of Graie's Inne an Otterbarrester of good standinge We doe hereby recommend him unto you requiring you to make choise of him thereto, givinge us therebie a testimonie of your conformitie to any thinge yt. is recommended from us to you. Geven under our signett at our pallace at Westmr. the xxij daie of November in the thirde yeare of our raigne of Greate Britaine Ffrance and Ireland.

The Copie of the Maier and Citizens of this Citie their petition unto the Kinge's Ma'tie to have their free election to make choise of a Recorder.

To the Kinge's moste excellent Maiestie

Most dreade and most gracious Sov'igne. In obedience of yo'r Ma'ties letters to us addressed dated the xxijth of November laste but delivered firste the tenth of this instant January for the electinge of Hughe Mainwaringe unto the office of Recorder within this Citie w'ch now is become voided by the death of our late Recorder the vijth of this month. Wee the Maior Aldermen and Counsell of the said Citie unto whom the election belongeth assembled ourselves together upon receipte of your Highnes said letters. But forasmuch as by the said charter granted unto us by your noble progenitor Henrie the vijth of blessed Memorie, and latelie confirmed by your Ma'tie noe person is eligible to that office excepte he be one of the xxiiij Aldermen and none can be chosen an Alderman excepte he be first enfranchised and made a free Citizen amongstest us Such the said Hugh Mainwaring is not nor ever came hither in person to desyre the same but is a meere stranger to us and the state of this incorporation for the observation of w'ch Charter and all other liberties granted to this Citie we have taken our corporall oathes. Wee therefore your Ma'ties most humble and loyall subjectes cannot without expresse breach of our oathes and infringinge of our liberties elect the said Hughe Mainwaringe to be our Recorder; of wh'ch our iuste excuse wee do most humbly beseeche your Ma'ties gracious acceptacon. And that your Highnes will be pleased of your accustomed grace and clemencie to vouchsafe unto us our free election and to give us leave to make choise of a man to that office who is capable thereof by our Charter, whereof at this tyme there are div'se amongstest us whoe are alreadie Aldermen of this Citie and such as have heretofore donne good service to this Corporation, and are evrie waie fitt for the place both for their learninge in the lawes, their knowledge and experience of our orders and liberties, and their sinceritie in the true religion And wee your Ma'ties moste loyall subjectes accordinge to our most bounden duties doe and will always upon the knees of our hartes praie to the almightie God for the most happie and prosperous estate of your most excellent Ma'tie longe to raigne ever us.

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No. 6.

Chester, March 7, 1684.

YESTERDAY was brought hither, the new charter, his majesty hath been graciously pleased to grant unto this city, by sir Thomas Grosvenor, our present mayor, accompanied with the high sheriff, our governor, sir Philip Egerton, and a great many other gentlemen of the county. At their entrance into the liberties they were met by the justices, the aldermen, and common-council, in their formalities, the *militia*, being *in arms*, and the twenty-four companies of tradesmen, making a guard from the Bars-gate to the East-gate, and the *battalion* in garrison here, making a *guard* from the East-gate to *Milk-stoops*. Being come to Guildhall, amidst the loud and repeated acclamations of the people, *the charter was read*, and the mayor having made a very loyal speech, which met with the general applause, satisfaction, and thanks of the assembly, he and the rest of the officers were sworn: which done, the mayor came to the Cross, drank the king's health, and ordered the conduit to run with wine, and afterwards treated the whole company very splendidly, the great guns firing from the castle, with volleys of *small shot*, the music playing, and bells ringing, with all other demonstrations of an universal joy.

No. 7.

To the king's most excellent majesty.

The humble and thankful address of divers of your majesty's subjects, commonly called dissenters, in and about the city of Chester.

Most gracious sovereign,

WE, your majesty's peaceable and loyal subjects, enjoying our comfortable share, with others, in the present ease, quiet, and liberty, granted by your late royal declaration, (which assures us of your majesty's gracious and generous inclinations and resolutions, not to impose upon the consciences of any in matters of religion) do, for ourselves, and on the behalf of many others of our own persuasion, present unto your majesty our most humble and hearty thanks, which we desire to do in such a manner as may best express our grateful resentments of such a great and princely favour; and, being not only obliged by the bands of our natural allegiance, to live peaceably under your government, but likewise from a principle of love and gratitude to serve your majesty, to the utmost of our capacities, in all instances of duty and loyalty, We do faithfully promise, that (by God's help) we shall always, in all things, demean ourselves with all due loyalty and subjection, and, as occasion shall be offered us, confirm the sincerity of our promises by the readiness and agreeableness of our actions and practices.

No. 8.

Thursday, March 27, 2d W. and M.

A petition of Roger Whitley and George Mainwaring, esqrs. was read, thereby setting forth that they were, and stand, duly elected for the city and county of the city of Chester, by the major part of the legal electors there; but that the sheriffs, not joining in the return, though Mr. Batho was willing (being one of the said sheriffs) so to do, and tendered an indenture signed by him and the electors for that purpose, to Mr. Partington, the other sheriff, who refused to join therein; but hath, to the apparent prejudice of the petitioners, returned sir Thomas Grosvenor, and Richard Leving, esq. by another indenture, without the other sheriff's joining therein, and without their being duly chosen; and praying the consideration of the premises, that the invalidity of the said pretended return may be examined, and the petitioners relieved.

Wednesday, December 2, 2d W. and M.

Report from the committee of privileges and elections, to whom was referred the
the

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the matter touching the election of citizens to serve in this present parliament, for the city of Chester, &c. The poll was thus, viz.

For Sir Thomas Grosvenor, . . . 498	For Mr. Whitley, 484
Mr. Leving, 494	Mr. Mainwaring, 457

On the behalf of the petitioners were called,

David Perry : who said 125 were made free after the teste of the writ, whereof 91 voted for the sitting members, and 23 or 25 voted for Mr. Whitley, and 22 voted for Mr. Mainwaring. Of the number that were so made free, were one Selby, an apprentice to one Waltham, and 16 others, that were minors.

That Bryan Bolland testified, that there are in Chester several almsmen, who wear badges, and have 4l. a year for their lives, whereof five voted for the petitioners, and eight for the sitting members; and that his son told him he had 10s. to make him free. That on the 18th of March he apprehended the poll was only adjourned; for that sheriff Batho said, "he adjourned it." And the next day 18 freemen came to vote for the petitioners, and were refused.

That Street, a witness, testified, that he was present when the new freemen were made, and took notice of it to the petitioners, and advised them to get some made free for them; but they denied it upon the case of Dartmouth. That several masters complained their apprentices were made free contrary to their knowledge; that two (as he was told) had 12s. apiece to vote for the sitting members; but confessed himself was made free when a minor.

That Richard Cooper said, he went with three men to the Bear, where sir Thomas Grosvenor came to them: and they told sir Thomas Grosvenor, that they had a mind to be made free, but wanted money; and he bid them go to Mr. Johnson, and let him look over their indentures; that if their indentures were right, they should have money; and that Mr. Johnson approved of their indentures, and they told him they had money, but he did not see them receive it. That Mr. Johnson voted for sir Thomas Grosvenor, and sir Thomas lodged in his house.

That John Orme said, he received of Johnson, and one Bennett, 12 or 13 shillings, to make him free, and vote for sir Thomas Grosvenor, and the other sitting member, Richard Leving, esq.

That Samuel Davies said, he received of Johnson and Bennett 32s. to make him free, and vote for the sitting members.

And both Orme and Davies said, if they had not received that money, they would have voted for the petitioners.

That on behalf of the sitting members were called,

Thomas Wilcock: who said, he had known all elections since the restoration, and that a son of a freeman may demand his freedom when capable of taking the oath of allegiance, viz. at 16 years of age; and that an apprentice has a right to his freedom if he comes out of his time before he is 21 years of age.

That Shelhorn said, he was mayor at the time of the election, and has known the several elections since the restoration, and never knew any freeman of Chester, young or old, rich or poor, denied his vote. That those who were made free, were either free born, or claimed by service; and that none were ever put by their freedom that were capable of taking an oath. That the aforesaid almsmen were never refused their votes. That alderman Street was active to bring aspersions on sir Thomas Grosvenor, on purpose to keep him off from being a parliament-man.

That William Wilson testified, that the aforesaid almsmen always voted, and that minors, if free, always polled. That Mr. sheriff Partington managed the poll, with the consent of the other sheriff, Batho; and made two proclamations before the closing the poll, and then closed the poll, the 18th of March. That next morning the books were cast up publicly, and the sitting members declared duly elected.

That Richard Hockenhul testified, that he saw all the proceedings, and he thought it a fair election. That the books were sealed up in the presence of Mr. sheriff

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sheriff Batho; and that it was said Mr. Johnson was a tenant to one of the petitioners.

That upon the whole matter, the committee came to several resolutions, which being read at the table, were as follow, viz.

Resolved, That it is the opinion of this committee, that sir Thomas Grosvenor, bart. is duly elected a citizen to serve in this present parliament for the city of Chester.

Resolved, That it is the opinion of this committee, that Richard Leving, esq. is duly elected a citizen to serve in this present parliament for the city of Chester.

The first resolution being read a second time, and the question being put, That the house do agree with the committee in the said resolution, the house divided,

Yeas, . . . 186

Noes, . . . 185

So it was resolved in the affirmative.

The second resolution being read a second time, it was resolved that the house do agree with the committee in the said resolution.

No. 9.

To the king's most excellent majesty.

The humble petition of sir John Mainwaring, bart. and Mr. Benjamin Chitchley, aldermen of the city of Chester, on the behalf of themselves, and other aldermen and citizens;

Humbly sheweth unto your majesty,

THAT about the 15th of July last, your petitioners preferred their humble petition to this most honourable board, setting forth the arbitrary and undue proceedings of Peter Bennett, grocer, late mayor of Chester, viz. by waving the fixed time, by order of assembly, for the choosing of common-council-men; and by taking upon himself the sole power of building our new common-hall, and altering the models and contracts with workmen, and refusing to consult with the committee appointed for that purpose.

That, upon reading the said petition, their excellencies, in council, were pleased to order the said late mayor to attend this most honourable board, in person, and to put in his answer, in writing; and also all other persons concerned are to attend.

That the said late mayor of Chester hath put in his answer accordingly, and that the said mayor of Chester and your petitioners are in town, and ready to have the cause heard.

That their excellencies did, by their order, recommend to the care and circumspection of the said Peter Bennett, the mayor, and magistrates, of the said city of Chester, the preventing as much as in them lay all such tumultuous proceedings, whereby the peace of the said city might any ways be disturbed.

That, notwithstanding the said order, the said Peter Bennett hath since caused five aldermen to be elected by an order of assembly, contrary to the express words of the city charter, and did thereby exclude the freemen their votes, who ought to have been the electors, and did greatly endanger the peace of the said city by such illegal election.

That whereas common-council-men are to be chosen yearly. He the said Peter Bennett (on purpose as 'tis humbly conceived) suffered the year to elapse, before he went to the election of the last common-council-men, by reason whereof 400 freemen absented themselves, and would not attend to give their votes lest they should seem to countenance a certain breach of their charter.

That, by reason of the freemen absenting themselves, the said Peter Bennett, and his accomplices, took the opportunity of turning out 32 of the old common-council-men, who all of them had subscribed the voluntary association, and were hearty and zealous to the government, putting in their stead men who refused to sign

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sign the said association, and may reasonably be suspected for their loyalty (two of them particularly, viz. William Francis, and Humphrey Page) standing convict on an indictment of high misdemeanor, for drinking the late king James's, and the pretended prince of Wales, their healths, with swords drawn, and have been both fined for the same; yet are they both thought so meritorious by the said Peter Bennett, that Page and Francis were chosen common-council-men, and Francis is thought fit, and presides, sheriff of the said city of Chester.

That as the said new common-council-men are the creatures of the said Peter Bennett, so have they gratefully expressed themselves to be such, having joined with some aldermen of like principles; and have, by order of their assembly, and by a bond, sealed with the common-seal of the said city, obliged themselves, and the said city, to repay the said Peter Bennett, all charges he shall be put to in the defence of his illegal and arbitrary proceedings.

That by means of which security so given, 'tis humbly conceived the treasure of the city is in great danger of being extravagantly expended; your petitioners, and all the freemen, are highly discouraged, if not, by your great wisdom, this evil, together with the rest of the breaches of our charter complained of, are not speedily redressed.

May it therefore please your most excellent majesty, and this most honourable board, that the said Peter Bennett may answer to the several complaints of this petition on this day se'nnight, being the 20th of this inst. January, the day prefixed for the hearing your petitioners complaints, set forth in their former petition. We humbly conceive it will be less trouble to this honourable board, and no prejudice either to your petitioners or the respondent, both sides being in town. But if it shall not so be thought fit by this most honourable board, we humbly pray a short day for hearing of all the said matters of complaint; and that you will give to your petitioners such relief, &c. &c.

No. 10.

Some further remarks to the freemen of Chester, confirming the wisdom of their resolution to house alderman Mainwaring, and alderman Bennett, for the mayoralty.

Gentlemen,

THE necessities that many honest tradesmen are often reduced to in their old age, not through any fault or misconduct, has so sensibly affected several persons, famous in their generation for works of charity, that they have left ample maintenance for poor freemen, and appointed the corporation the trustees of their benefactions.

Several of these noble charities are sunk, and the money lost, through the negligence of the trustees; which is a great discouragement to future acts of charity of the like nature.

Therefore it is proposed, as an act of justice, that these funds shall be re-established out of the profits that arise by making of freemen. There is now near 300*l.* paid into the treasury upon that account. Every reasonable man will allow that this is the most equitable way of disposing of the money, because when any freemen are made, the privileges of the former freemen are divided amongst so many more. This, gentlemen, you must allow to be a laudable design, and you cannot doubt but it will be promoted by such worthy, public spirited men as Mr. Mainwaring and Mr. Bennett.

The profits arising from John of Jerusalem's lands were left for the maintenance of poor widows, and other pious uses.

Query.—Have they been so employed? Has the alderman, under whose directions the money has been laid out, made up his accounts? Or is it probable that he ever will?

Mr.

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Mr. Cotton left a legacy for sick and maimed freemen. Do any of you partake of the benefits of that charity?

If the friends of the navigation succeed, these and other affairs of the like nature will be strictly inquired into.

In a senseless letter, published last night, we are told, that of late "the places of mayor and sheriffs have been filled peaceably, and no man hitherto has had occasion to repent of his choice." See, gentlemen, how you are insulted! They have for many years trampled upon your liberties; appointed what magistrates they pleased, without the least regard to merit; and if any citizen has ever seemed desirous of a fair poll, they have branded him with the name of mal-content. And yet they have the assurance to appeal to you, whether you have ever repented of your choice, when they have done all they could to rob you of your undoubted privilege of choosing your own magistrates; and have generally imposed upon you such as have been (for good reasons) disagreeable to the citizens.

But now you have taken up a brave resolution to assert your privileges, and house those gentlemen for the mayoralty, who, you know, will carefully maintain all your privileges, rights, and liberties, and do you and all the inhabitants justice and honour.

No. 11.

Chester, April 23, 1734.

THIS is to give notice, that whereas endeavours are continually used to mislead the citizens, and prevail on them to believe the works of navigation are intended to be carried on only till the next election, and that the river will never be made navigable: if any person dare lay any wager, from ten guineas to five hundred guineas, that the river Dee will not be made navigable, pursuant to the act of parliament obtained for that purpose, and will deposit their money in Mr. Murrey's hands, it will be accepted.

No. 12.

Chester, April 28, 1734.

IT is computed it will cost the undertakers to make the river Dee navigable, about twenty-five thousand pounds, and that the advantages that will accrue to the undertakers will be upwards of two hundred thousand pounds; from which it appears, it must be the interest of the undertakers (abstracted from elections and every other consideration whatsoever) to carry on and complete the work: it is therefore submitted to the public, how idle and ridiculous it is for the m---r and two candidates, at this time of day, to go about to tell the freemen there will be no navigation.

No. 13.

Chester, May 6, 1734.

WHEREAS it is industriously reported by wicked, and generally believed by weak, people, that the navigation of the river Dee is begun, and carried on by great numbers of workmen, under the direction of Mr. Kinderley, pursuant to an act of parliament obtained by Mr. Manley; this is to satisfy the public, that such reports are spread abroad for very bad purposes, viz. the breaking in upon that natural and indefeasible right which sir R. G. and his heirs undoubtedly have, to represent the city of Chester.

It is true, there was an act of parliament lately obtained for making the river Dee navigable; but pray by whose interest, or at whose expence, was that act obtained? Will any have the front to say, that Mr. Manley had a hand in it? Has not sir R. G. told you over and over again, that it cost him and his predecessor, many thousand pounds to promote the navigation? Were not capt. Parry and Mr. Maccay sent here, at the charge of that family; and did not the latter, with great care and pains, take a survey of the river, produce a plan of it in the h---e of l---ds, and make it appear as plain as a pike-staff, how practicable such an undertaking was? Did he not tell how many millions of solid yards were contained in the intended

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tended cut, how much the digging of it out would amount to at a groat a yard, where, to an inch, all that sand would subside, and what effect it would have on the navigation to Chester and Liverpool? He likewise told how many hundred millions of tons of tide would be prevented by the work of navigation, from flowing over the white sands, which plainly proves that those sands (the principal reward for the undertaking) may be recovered; and all the damage that can possibly happen thereby, is, that by excluding such a quantity of water, it may raise the sea to an unusual height, and disturb the pacific ocean. Now can any one imagine, that Mr. Parry, Maccay, and others, such as solicitors, council, evidences, expresses, besides petitions from several quarters, assemblies, close application, and affected delays; I say, can any one imagine, that all and every of these, during the course of two sessions of parliament, were not very expensive? To all this let me add, that it was owing to the interest and influence of E---N FRIENDS that the bill found such an easy passage through both houses: this is certainly true, for I have seen it in print in one of A---ms's Journals, an author of undoubted veracity. Many, very many, such instances might be given of sir R-----'s firm attachment to the interest of this city! yet this gentleman has the misfortune of being represented in a quite different view, even by some who pretend to be his friends, and frequently tell the freemen, when soliciting their votes, that the navigation is all a SHAM. O horrible shame! Shall we wonder more at their ingratitude, or at his patience in bearing it!

As to the idle reports raised by some who have the assurance to oppose sir R. the very mentioning of them is enough to confute them; such as, that some hundreds of wheel-barrows have been made for the use of the navigation; that Mr. Kinderley has above two hundred men at work on Brewers-hall marsh, and embanked a great part thereof. Indeed, as to the wheel-barrows, there were a few made, but were they not all sold to alderman B----t? And I challenge any man to prove, that Mr. Kinderley has been at Chester these twelve months, or that any men have been at work, or any banks raised, on that marsh, or the least step took towards carrying on the navigation. Of the truth of this, any one may be satisfied who will be at the pains of going to view the said marsh. This is the best way that I know of, to conviction; but if any will be so lazy, or so perverse, as to form their judgment of things from common fame, or the din of a party, rather than from the objects themselves, they must jog on in their own way, and take their rank among the NOODLES!

No. 14.

Chester, May 21, 1734.

ON Wednesday last, the election of representatives for this city began at our town-hall: the candidates on the one side were sir Robert Grosvenor and sir Charles Bunbury; on the other, Mr. Manley and Mr. Williams. On Friday in the afternoon, a squabble arising amongst the citizens assembled in the hall, occasioned by the violence of the *constables*; the returning-officers, on that pretence, quitted the place, closed the books, and carried them away, though the court was quiet and unmolested, and though Mr. Williams and Mr. Manley insisted upon going on with the poll, and protested against any adjournment. The next morning, those candidates waited on the sheriffs, and demanded a return as the poll stood the night before, by which it appeared, that they had a considerable majority of legal votes. The sheriffs, however, called a *pretended* court, and took the poll of all that offered themselves, and so got a majority of voices in favour of the two baronets. But notwithstanding this extraordinary step taken by them, and the assistance of a multitude of *foreigners*, it is not at all questioned, but at a proper time and place it will evidently appear, that Mr. Manley and Mr. Williams had a legal and fair majority of *resident freemen*.

* b

To

A P P E N D I X.

To the resident freemen of Chester.

Gentlemen,

WE take this opportunity of returning you our thanks for honouring us with your votes at the late election; and beg you'll be assured, that we shall steadily persevere in defending your rights and privileges against the encroachments of *foreign*, or the usurpations of *domestic* invaders; and that it shall be our constant endeavour (as it is our greatest pleasure) to be serviceable to our friends, and to promote the trade and interest of the city, to the utmost of our power.

As for those who have basely given out, that the scheme of the navigation was only calculated for the election, and would determine with it, we leave the work to give the lie to such mean dealers in falsties and scandal.

We are, gentlemen,

Your sincere friends and humble servants,

RICHARD MANLEY,
HUGH WILLIAMS.

Chester,
May 21, 1734.

No. 15.

TUESDAY, Feb. 2, 1747, came on the hearing of the matter of the petition of James Mainwaring, jun. esq. and the petition of several persons whose names were thereunto subscribed, complaining of an undue election and return for the city of Chester; and as their complaint was singly against the election of Philip Henry Warburton, esq. he alone appeared by his counsel in support of his election. The dispute was about the *right* of electing, which by the petitioners was stated to be only in such citizens of the said city as are *inhabitants* within the same, or the liberties thereof, and admitted to their freedom by birth or servitude, and not receiving alms or any public charity; whereas by the sitting member the right of election was stated to be in the freemen of the said city *in general*.

The original charter granted to the said city by king Henry VII. and the confirmation thereof by queen Elizabeth, were produced, and part thereof was read, to prove that the right of electing the mayor, and several other officers of the said city, was vested in the citizens *commorant* within the said city, and that commorant citizens only were eligible into those offices.

And a witness was examined in order to prove, that antiently such citizens only had enjoyed the right to vote in the election of citizens to serve in parliament for the said city, as were intitled to their freedom by birth or servitude.

And another witness was examined in order to prove, that the said right was in such citizens only as are *inhabitants* within the said city, or the liberties thereof, and admitted to their freedom by birth or servitude, and not receiving alms or any public charity.

On the other hand, the sitting member shewed, from the resolutions of the house so far back as the 2d W. and M. that other freemen had voted at elections; and having produced several polls taken at elections of members of parliament for the said city, he proposed to prove, that many of the persons who voted at each of the said elections were not commorant in the said city when they voted; but the same was admitted by the petitioners. Then he proposed to prove, first, that several honorary and non-resident freemen had been elected into the offices of mayor and sheriff. Secondly, that honorary freemen had exercised trades within the said city. Thirdly, that freemen who had purchased their freedom were exempted from toll, as well as other freemen: but the whole was admitted by the petitioners.

The question being put, "That the right of election of citizens to serve in parliament for the city of Chester, is in the mayor, aldermen, and common-council, of the said city, and in such of the freemen of the said city, not receiving alms, as shall have been commorant within the said city, or the liberties thereof, for the space of one whole year next before the election of citizens to serve in parliament for the said city;"

The

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The house divided—Ycas, 141—Noes, 92.

The counsel for the petitioners acquainted the house, that the house having come to the aforesaid resolution, they were instructed to say, *that the petitioners will give the house no further trouble.*

It was then resolved, *nem. con.* that Philip Henry Warburton, esq. is *duly* elected a citizen to serve in this present parliament for the city of Chester.

No. 16.

October 20, 1784.

An address to the inhabitants of Chester.

INTIMATION having been already given, that an endeavour would be made to restore to the freemen of the city of Chester their privilege (long unjustly withheld) of the annual election of the *whole body* of corporation-officers; it is thought expedient to explain to them a little more largely the motives for such an undertaking, and the manner in which it is intended to be conducted.

It must strike every thinking man with astonishment, that meanings so plain, and privileges so invaluable as the following words convey, should ever have been suffered to be so grossly perverted, and so tamely relinquished—"We give and we grant, for us, our heirs, and successors, to the abovenamed city and commonalty, their heirs, and successors, that they and their successors, for ever, shall and may make and appoint, *every several year*, twenty-four citizens of the city before-mentioned *aldermen*; as also forty other citizens of the same city for the common-council of the said city—All the citizens *dwelling within the said city*, suburbs, and villages thereof, may (on the annual day of election) come freely to the Common-hall of the said city, who, or the greater part of them, shall name *two* citizens, *dwelling in the said city*, out of the twenty-four aldermen; of the two so named, the greater part of the aldermen and sheriffs then and there present shall chuse and appoint one mayor," &c.

None of the inhabitants of this city need be told, that at the Common-hall, held on the day of the annual election, aldermen and common-council-men are not so much as named; and that instead of being called upon to return two resident aldermen for the *house* to make choice of one for mayor, they are amused (let it not be said *insulted*) with an idle tale, repeated from year to year, in nearly the same words, of meetings held the *preceding day at another place*; of so many votes for alderman *This* and alderman *That*; when all the world knows that the line of succession to the chair has been settled years before; besides which, the mayor thus appointed (not chosen) has in many instances been a *non-resident*, and of consequence legally disqualified from filling the office.

Whence originated this daring violation of the chartered rights of this injured and degraded city? By what desperate hand was the dearest privilege, the birth-right of Englishmen first torn from its citizens? Had not a long lapse of years concealed the tyrant's name from our knowledge how should we have loaded it with execrations!—But it is comparatively of little moment to inquire into the commencement of the evil; we know but too well, that by this daring stretch of power, the corporate house, instead of being the faithful and secure repository of the franchises of the commonalty, became the servile instrument of promoting the interested purposes of a particular family—instead of returning into the hands of their constituents, the authority with which they were for a time invested, they assumed the prerogative (a horrid monster in the British constitution) of electing and re-electing each other—in short, they became the slaves of one house, that they might be tyrants over the rest of their fellow citizens!

So long have these abuses subsisted, and with such careful industry has the charter been concealed from public view, that charity obliges us to suppose that by far the greater part of the corporate house themselves have been ignorant of the unconstitutional and illegal powers they were exercising—it is certain, however, that the

freemen

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freemen at large were totally unacquainted with their own consequence as an integral part of the corporation, not to be separated from it without the intire dissolution of the whole. But the times of darkness are now past; the charter is brought forth out of the obscurity in which it hath so long been wrapt, and if the usurpations complained of are allowed any longer to subsist, it can only be through the most unpardonable negligence and supineness on the one hand, or the most hardened impudence and villainy on the other.

Better things, however, are hoped: and as the spirit of the commonalty is now roused to a demand of the restoration of their rights, one would not willingly believe that there can be found a man hardy enough to set his face against them, and, in bold defiance of justice and honesty, to venture upon a refusal. A question so plain it is scarcely possible to confound by the utmost subtlety and ingenuity the uncertainty of the law ever gave birth to. If, therefore, this demand, which is intended to be made on the approaching day of election, be granted, a poll must ensue, in which, whatever party is successful, the commonalty have obtained their rights, and the grand point is secured. But if, contrary to all reasonable expectation, the old, corrupt mode of appointing officers be obstinately adhered to, a large subscription is already entered into for prosecuting the matter in a court of justice, and as that subscription will most certainly yet receive considerable additions, so it is equally certain that there is scarce a man whose name appears in the list, who is not ready to advance more than double his original sum, if it shall hereafter appear to be requisite, in support of so righteous a cause.

It will immediately occur to the discerning part of the public, that those who stand forth on this occasion, have views that extend much farther than the mere annual election of city-officers—they avow it—they disclaim even an attempt to conceal any of the motives of an undertaking that has only justice and freedom for its object. It is indeed sufficiently obvious that if it succeeds, the interest of the Eaton family, in this city, will be reduced into a narrower compass: but their intire exclusion, were it ever so practicable, has not been so much as thought of. The *lasting* peace, harmony, and prosperity, of the city of Chester, lies nearest the heart of every one immediately concerned in this business, and they are sensible that this can only be effected by an *union* of parties, and that to erect one faction upon the ruins of another, would be the certain introduction of everlasting discord and ill-will. How happy would it be, if those, who, on a late occasion, so loudly recommended peace and harmony, would adopt similar sentiments, and generously relinquish that part of their consequence which has been maintained (hitherto perhaps unknown to them) by means so unjustifiable, so subversive of every thing which members of a British senate ought to hold most sacred, and which, while they are suffered to exist, must render the recommendation of peace and harmony, an insult too great for the spirit of Englishmen to endure. If unfortunately such a conciliatory plan should be rejected, repeated contests will be unavoidable; the independent part of the commonalty know their own strength, which will undoubtedly receive many additions of worthy and honest men, who have hitherto sided with their opponents, unconscious what a corrupt system they were supporting. And the restoration of annual elections (which may be looked upon as certain) will afford such frequent opportunities of asserting and maintaining the freedom of their choice, that, with the blessing of heaven on so just a cause, they cannot fail of being in the end successful.

In fine—let this important truth be deeply impressed on the mind of every Briton—*That frequent elections can alone secure the liberties of the people.*

E.

No. 17.

To the free and independent citizens of Chester.

THE event of your application to the court of King's-bench has unexpectedly proved (for the present) unfavourable to your wishes. It may not be unnecessary to inform

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inform you, that a brief for counsel, stating and proving a circumstance totally destructive of the *new-fangled charter*, which was sent off by the coach on Sunday evening last, has somehow, *unaccountably*, miscarried. In this stage of the business we are therefore foiled; but you may rest assured, that the final success of a cause so just, so upright, and so honourable, as that in which you are engaged, depends entirely on the spirit with which you support it.—Be not dismayed, and you will certainly regain your chartered rights, in spite of every effort to withhold them.

Chester, Jan. 29, 1785.

S.

E.

No. 18.

February 4, 1785.

IT is now, we believe, pretty generally understood, that the assertors of the chartered rights and franchises of this city, are not thrown into that state of dejection and despondency which their opponents vainly imagined would have been the consequence of their late disappointment. On the contrary, they are convinced that the very circumstance which carries, *apparently*, an unfavourable aspect on their cause, will prove, in the end, the occasion of their triumph. And they think it a duty they owe to that community in defence of whose rights they thus stand forth, to explain, as far as prudence may permit, the grounds of this their expectation of success.

It seems as if our adversaries had persuaded themselves, that if a decision in their favour could once be obtained, we should be so dispirited and disunited, that we should never dare hereafter to lift up our heads, or move our lips, in contradiction to their unconstitutional and usurped authority. Finding that we confidently relied on the validity of the charter of Henry VII. they set about searching for something to set up in opposition to it, and were fortunate enough to meet with a charter granted to, or rather imposed upon, the citizens, in the latter end of the reign of Charles II. The particular clauses in this charter that suited their purposes, were therefore pleaded in answer to our complaint; and these were—a power to elect aldermen and common-council-men in the mode which at present prevails—a grant of certain lands belonging to St. John's hospital, and of an annual fair to be held in February, the two latter circumstances being adduced as implying the acceptance of the whole of this charter by the citizens, and consequently as proving it to be that under which they are incorporated. But it is observable, that a *direct assertion* of such acceptance was cautiously avoided; and we give them credit for their modesty in this particular, since they have again and again, not longer than seven years back, pleaded the charter of Henry VII. as the charter of their incorporation; however, the production of one of a date so much later, and apparently perfect in every essential particular, unavoidably occasioned a temporary determination in their favour.

Unwilling as we are to suppose our present corporation enemies to the revolution and the illustrious house of Hanover, yet we cannot but express our astonishment that they should venture thus decisively to reject a charter that breathes the genuine spirit of the constitution, and adopt another that was framed for the express purposes of arbitrary power under the tyrannical reign of a Stuart, and which actually RESERVES TO THE CROWN A POWER OF PUTTING IN AND PUTTING OUT CORPORATION OFFICERS AT PLEASURE. If unhappily our opponents should finally succeed in establishing it, and any other than the *most reputable characters*, and such as were likely to be an ornament to the chair of magistracy, should happen to be chosen into the corporate body, the only resource of the citizens must be to petition his majesty, that he would be graciously pleased to exercise the power reserved to him by the charter, and remove such obnoxious persons for ever from the government of the city. But how distressing must it be to a sovereign, whose throne is established, not on the despotic principles of slavish submission, but on those of constitutional liberty and the affection of his subjects, to find himself thus called upon to do

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do those very acts by which the Stuart family so justly alienated from themselves the hearts of the people. The mind of every true Briton must revolt at the very idea, and we trust his majesty's faithful citizens of Chester will never need to approach him on so disagreeable an occasion, for we are happy to assure them, that we are in possession of documents, which prove in the most authentic, indubitable, and decisive manner, that this odious charter was, so far as relates to the election of corporation-officers, *made null and void, the antient charter completely restored*, and with it those very officers who were in being at the time it was wrested from the citizens.

On the whole, we cannot but think this proceeding on the part of the *present* corporation must appear to be a mere expedient (and that of a very desperate nature) to prolong their existence for a few months; nay, we should not be surprized, if the honourable court should view it in the light of an *unwarrantable deception*, and as such, treat it with becoming indignation, when the *whole truth* is laid before them. In the mean time, we wish every citizen to divest himself of party-prejudice, and to be fully persuaded in his own mind as to the rectitude of the cause he espouses; and to remember the solemn oath he took at his admission to the freedom of the city, namely, "That he will be obedient, profitable, and true to the king of Great-Britain, and the earldom of Chester, and to the commonalty of the said city, and truly the franchises of Chester maintain with all his might and power."

E.

No. 19.

February 11, 1785.

IF our readers would be better acquainted with the history of the CHARTER under which the corporation have thought fit to take shelter, let them peruse the following extracts from that honest man and loyal subject, bishop Burnet: a violent dispute had arisen between Charles II. and his parliament, concerning the exclusion of the duke of York (afterwards James II.) a professed papist, from the succession to the crown, and the king, by the sudden dissolution of two parliaments, and other state-manceuvres, had prevented that business from being accomplished; "The court (says the bishop) was every where triumphant. The duke was highly complimented by all, and seemed to have overcome all difficulties. The court, not content with all their victories, resolved to free themselves from the fears of troublesome parliaments for the future. The cities and boroughs of England were invited, and prevailed on to demonstrate their loyalty by surrendering up their charters, and taking new ones modelled as the court thought fit. It was much questioned whether those surrenders were good in law or not: it was said, that those who were in the government in corporations, and had their charters and seals trusted to their keeping, were not proprietors, nor masters of those rights. They could not extinguish those corporations, nor part with any of their privileges. Others said, that whatever might be objected to the reason and equity of the thing, yet when the seal of a corporation was put to any deed, such a deed was good in law. The matter goes beyond my skill in law to determine it: this is certain, that whatsoever may be said in law, there is no sort of theft, or perfidy, more criminal than for a body of men, whom their neighbours have trusted with their concerns, to steal away their charters, and affix their seals to such a deed, betraying in that their trusts and their oaths." Let those who know what the privileges of the commonalty were under the *rejected* charter of Henry VII. and the total demolition of them by the *adopted* charter of Charles II. make the proper application of this passage.

"New charters were sent to most of the corporations, in which the king reserved to himself a power to turn out magistrates at his pleasure. This was done to make all sure for a new election of parliament, which now came under consideration."

Again, under James II. "All arts were used to manage elections, so that the king should have a parliament to his mind. In the new charters that had been granted, the election of the members was taken out of the hands of the inhabitants, and restrained to the corporation-men, all those being left out who were not acceptable

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ceptable at court. In some boroughs they could not find a number of men to be depended on, so the neighbouring gentlemen were made the corporation-men." Such were the practices of an arbitrary court; in which we trace, but too plainly, the features of that management by which the *commonalty* of this city have been deprived of the exercise of their elective franchises.

But on the approach of William, our glorious deliverer from popery and slavery, the consciousness of guilt threw the tyrant into the wildest confusion. "He sent for the bishops, assured them of his affection to the church of England, and desired they would offer him their advice what was fit for him to do. They advised the present summoning a parliament, and that the law might be again put in its channel. But the proceedings of the court that way were cold and forced. The writs for a parliament were often ordered to be made ready for the seal, but as often stopped. Some were sealed and given out, but they were quickly called in again. The old charters were ordered to be *restored again*. *Jefferies* himself carried back the charter of the city of London, and put on the appearance of joy and heartiness when he gave it to them. All men saw through that affectation, for *he had raised himself* chiefly upon the *advising* or *promoting* that matter of the surrender and the forfeiture of the charters." It is right the c--p--a---n should know to *whom* they are obliged for a charter that has suited all their purposes so exactly.

E.

No. 20.

To the independent freemen of the city of Chester.

THE period is now at hand when the fate of your ANTIENT CHARTER is to be determined, and when it will be seen whether the corporation have a legal right to *constitute themselves* your *perpetual* lords and rulers.

None of you are ignorant that in defence of this most obviously-unreasonable claim (unhappily so long acquiesced in) they have set up a charter, or rather an instrument of oppression, the most abominable that tyranny and despotism ever contrived, whereby ALL your elective franchises are at once annihilated; and you need not doubt but every means will be used to make *this* appear to be the only existing charter of the city. Whether, to oblige the corporation and their patrons, you ought tamely to submit to the fetters thus forging for you; or whether, as men, as Britons, as free citizens, you ought to stand forth in defence of all that should be dear and valuable to you or your posterity, let the following comparative view of the contents of both charters enable you to judge:

By the charter of Henry VII. the citizens freely assembled in Common-hall are to return, by majority of voices, two aldermen to the court of aldermen for their choice of one to be mayor; thus giving them, agreeably to natural and constitutional right, a power of chusing the person who is to watch over their welfare, and administer justice among them, and at the same time making a wise provision against the abuse of that power.

By the charter of Charles II. the corporation may shut themselves up in the council chamber, and make whom they please mayor, and we may be sure his principal qualification for that office will ever be, an inflexible adherence to the cause the corporation happen to espouse—nay if the present body should receive the mandate, they might make an Eaton coach-horse mayor, as the tyrant Caligula made his a consul, and the citizens have no power to prevent it.

By the charter of Henry VII. the mayor is to appoint one sheriff, and the citizens to chuse the other, by majority of votes—In this instance also their liberties are secured, and at the same time a most equitable and proper precaution taken to preserve a balance between them and the corporation.

By the charter of Charles II. *both* sheriffs may be chosen by the corporation in the same mysterious manner as the mayor.

By the charter of Henry VII. the *whole* corporate body is to be annually chosen or re-chosen by the freemen at large. By which grant no doubt it was intended that

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that they should elect a number of the most respectable and discreet of their fellow-citizens, to make wholesome laws, for the better government of the city, to favour the extension of its trade, and, in all respects, to act as their upright, honest, and independent representatives. But their authority was to return into the hands of their constituents at the end of every year, that those of them who had acted in a proper manner might be distinguished by the approbation of their fellow-citizens, and honourably replaced in their offices; and that if any of them had abused the trust reposed in them, they might be the objects of merited disapprobation. Could human wisdom have devised a more probable method of rendering a community respectable, flourishing, and happy? Of this invaluable privilege the citizens of Chester were once in legal possession, and might have so continued had it not been for the inordinate ambition of a neighbouring family, by whose means it was forcibly wrested from them.

The power granted to the corporation by the charter of Charles II. to chuse and refuse each other, exactly suited their views; and having taken effectual measures to introduce their own creatures into the body corporate, none were afterwards suffered to become members of it but those who it was believed would be ready to sacrifice every thing to the interest of their leaders. By such a corrupt and unconstitutional mode of election, they became, instead of the respectable and worthy representatives of the commonalty, the mean and despicable tool of a party, the mere footstool to lift their patrons into the seat of power, and so have continued, with the exception, sometimes, as at present, of a few worthy individuals who have had virtue enough to think and act for themselves. In such circumstances one could scarcely regret, that in the charter of Charles II. a power is reserved to the crown of removing any or all of them at pleasure, thus at once subjecting both them and their lords and masters to the arbitrary will of a minister.

Happily for us, fellow-citizens, there still remain irrefragable proofs of the existence of the old charter, in that the election of mayor and sheriff have hitherto continued with the commonalty. It is absolutely necessary that these remaining privileges should be inviolably maintained. If you once suffer them to be taken from you (and no doubt endeavours will be used for that purpose) your liberties and franchises are in the most imminent danger. In order to preserve them, a poll for mayor and sheriff is about to be demanded, and such of you as chuse to stand forth the manly and firm assertors of your rights on this occasion, agreeably to your solemn oath, as freemen, are desired to give your attendance at the Common-hall, at the time of election.

It is observed by an eminent political writer, that "A body of citizens, decently, yet strenuously, contending for the preservation of their rights, is one of the most glorious sights under heaven." Such a spectacle, it is trusted, the free citizens of Chester will, on this and every similar occasion, exhibit. Let them assemble peaceably, give their votes peaceably, and depart peaceably. And let *their* behaviour prove (what that of their opponents has not always done) that they are not more the friends of freedom, than the enemies of licentiousness.

October 20, 1785.

E.

No. 21.

To the worthy and independent freemen of the city of Chester.

BEING a real well-wisher to the peace and prosperity of this antient city, I feel myself greatly hurt by the present disturbance, when I consider, that it is in the power of *half a dozen* persons in trade to cause so great a mischief, intirely to gratify their own malevolence. I am amazed where they can find any persons that will be dupes to their artifices—Shall we join in league with men whose avowed principles are against kings, kingly government, and the *established* church?—Shall we form political connexions with men who declared themselves the friends of the *American* rebellion, and rejoiced, *publicly*, for every advantage that was obtained against his majesty's

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majesty's arms?—Shall we countenance men who, from their infancy, are taught to oppose men in power, from the vestry officer to the king upon the throne?—Shall these men, at the holding up of their finger, put the whole city into riot and confusion, whose *Gordonian* feelings would be highly delighted to see the city in flames of fire?—Let us all, of whatever party we profess ourselves, join hand in hand to discountenance and suppress these domestic wars; and by uniting heartily in the common cause, convince the world, that if we do oppose each other, it is from a better principle than that which actuates the leaders of the present opposition.

O^r. 20, 1785.

AMICUS.

[N. B. As this is the *only* paper published on the part of the corporation, during the whole of the dispute, it merits particular attention.]

No. 22.

To the free citizens of Chester, friends to its charter and franchises.

WHILE our opponents are pluming themselves upon their imaginary victory, and speaking in the most contemptuous terms, of our apparently feeble opposition to that sovereign authority which ought, no doubt, to strike us with awe, and humble us into submission, let us cheerfully reflect on the solid advantages *that* opposition has produced.

It was highly necessary to embrace the opportunity which the election of city officers presented to us, of endeavouring to establish and substantiate, in as many points as possible, the ancient charter, the bulwark of our liberties, preparatory to the approaching decision concerning its validity. A poll for mayor and sheriff was accordingly demanded; and that the qualifications of voters might be ascertained, it was proper to continue the poll to such a length, as that a sufficient number of objectionable votes might, upon a scrutiny, be pointed out and argued upon. Contrary to the express terms of the charter, non-resident freemen have formerly been allowed to vote at city elections; but they have now been struck off; and with what weight all these circumstances will come before a court of judicature, must be evident to the most common understanding.—And surely we may be indulged in a harmless smile, when we think, that a very trifling expence, and the votes of no more than eighty freemen, created such an alarm among these high and mighty potentates, and reduced them to such shifts, that despairing to find *voluntary* support, they were obliged to bring a whole host of *mercenaries* into the field, at a considerable charge, to vanquish and overcome these eighty *free* men, displaying on this glorious occasion all the parade of a decisive victory—*Risum teneatis!*

But it must have occasioned more painful sensations to have seen in some instances (though not that of the late worthy mayor, whose coolness and impartiality merit the highest commendation) the gravity and dignity of the magistrate giving way to the intemperance of the flaming zealot, and the good manners of the gentleman lost in coarse epithets and illiberal insinuations.—And why? Truly because freemen have chosen to exercise, in a just cause, the rights which God and the constitution of their country have given them. And indeed if any proof were wanting in order to convince the most prejudiced man among us of the haughty, overbearing, and oppressive spirit of our opponents, he may find it strikingly displayed in a paper with the signature of *Amicus*. With what sovereign contempt does he speak of that inferior order of beings, *persons in trade*, and how is he hurt, that *they* should dare to *lift up a finger* in opposition to *men in power*! It were to bestow an honour on his publication, which it does by no means merit, to refuse, or even barely to deny, his absurd and ridiculous charges against the *dissenters*.

Suffice it to observe, that he forgets there are among them, many whom he is glad to own as friends to his cause. And will the *loyal*; the *pious*; *Amicus* “join in league with men whose avowed principles are against kings, kingly government, and the established church?” O yes!—he has not the least objection—he will receive any of these traitors to church and king with open arms, who have a *vote* to

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give

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give him, nay (if we may judge by his hatred of a dissenter as such) were Lucifer himself a freeman, he would not scruple to take him by the hand, with "my dear friend, shall I be honoured with your vote and interest?" and we will not assert that he would meet with a refusal. In the name of common sense then, let us hear no more of this nonsensical rant; it will not do for *these* times, this is indeed a *stale device, a worn-out trick*, too poor to take in even the lowest of the vulgar, and quite of a piece with the assertion that men who have a considerable property of their own in the city, would be *highly delighted to see it in flames of fire!*

But alas! there is a much more obvious cause of that vexation, which Amicus, and his associates, are at so little pains to conceal. They cannot forget the *rule* for an *information*, in the court of King's-bench, by which their proceedings are impeached, and by which they are obliged to appear at the bar of justice, to answer for their usurpations. They see this rod hanging over them, and even now begin to anticipate the smart of it. In the mean time, by way of consolation to their troubled spirits, let them know, that we are determined calmly and firmly to pursue our purpose by every legal and warrantable means; that we fear not the face of any man, or set of men, while we are conscious of the integrity of our views, and that we are doing no more than our duty as independent Englishmen. We trust that time, perhaps a very short time, will make it appear, that our conduct has been at least as unexceptionable as that of our opponents: and even though the *present* generation of our fellow-citizens, who view our actions through the medium of party-prejudice, may not be disposed to do us justice, we are confident a *future* will.

Saturday, Oct. 22, 1785.

E.

No. 23.

Chester, Oct. 22, 1785.

The following account is laid before the public, with a view to wipe off from dissenters the reproaches occasionally thrown out against them, as enemies to monarchical government, as well as every order of civil power, and particularly by the author of a late paper signed AMICUS, the virulent spirit of which against that body will, probably, operate more forcibly towards uniting them in the cause of freedom, than any thing that has occurred heretofore; and that the effects of that union will be experienced on the first occasion that presents itself.

"THE puritan or presbyterian clergy were the only body of men in the whole kingdom, who had the courage to oppose, and to protest openly against, the trial and condemnation of Charles I. With great danger to themselves, they presented a bold remonstrance to the general and council of war, the then ruling powers; warning them in the name of God, and conjuring them in the most solemn manner, to desist from their violent proceedings against the king. This long and spirited protest was signed by above fifty of the principal presbyterian ministers in and about London, and presented January 18, 1648-9."* "The presbyterians and body of the city" (says bishop Burnet) "were much against it, and were every where fasting and praying for the king's preservation."† Archdeacon Echard says, "Cromwell first pulled down the presbyterians, and then destroyed the king; and that almost all the presbyterian ministers in London, and very many in the several counties, and a few of the independents themselves, declared against the design in their sermons, in conferences, in monitory letters, petitions, protestations, and public remonstrances: they earnestly begged, that, contrary to so many oaths and imprecations, contrary to public and private faith, &c. they would not defile their own hands and the kingdom with royal blood."‡

Abundant

* See the whole protest, Neal's Hist. Purit. iii. p. 532.

† Hist. of his Times; vol. iii. p. 31.

‡ Echard's Hist. of England, p. 654, 708.

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Abundant proof of the same might be produced from Clarendon, Rapin, &c. but the age is too much enlightened now to need it.

The presbyterians had the principal hand, and were the chief agents, in restoring king Charles II. to the throne. This appears beyond a doubt from the united suffrages of the historians of those times.

These are notorious facts, which cannot be controverted; and yet, in the face of all this evidence, and much more, Amicus (than whom I suppose no person can be more ignorant of what relates to the dissenters) stands forth and says, "these men" are taught from their infancy to oppose men in power, from the vestry officer to "the king upon the throne." The fact is, that some of them took an active part on the opposite side to Amicus, in the disturbance he refers to, and with which he feels himself so much hurt; therefore he endeavours, even at the expence of truth and candour, to raise a popular clamour against them. And though since the disgraceful termination of the American war, its warmest partisans seem to have given up, as indefensible, the justice, wisdom, and policy of it, yet the intemperance of Amicus's zeal has been such, that, to crown all, and to render them, as he thinks, completely odious, he prefers a charge against dissenters on that score, calling them "friends to the American rebellion," and "men who rejoiced publicly for every advantage that was obtained against his majesty's arms." If by the former part of his charge he means that they were averse to the war, and would have prevented it, had it been in their power, we have a pleasure in acknowledging, that a large majority (I wish we could say the whole body) of our dissenting brethren were in that scheme, and happy indeed would it have been, if an evil of so great magnitude to both countries could have been averted by any means, even by the instrumentality of men who are unhappily the scorn of Amicus—the dissenters. If in any instance the latter part of the charge is true, we will readily allow, that the party so offending (like our friend Amicus in a recent instance) discovered more zeal than prudence, however without some better evidence than the bare assertion of Amicus, we will not admit that part of the charge.

Why to reprobate the American war should be a crime in a dissenter, and not so in a member of the established church, it is not easy to conceive: lord Chatham, that great luminary in politics, thought it no disgrace to him to be a leader in the opposition made to it, in which many of the first personages were also engaged; and it is certain, that great numbers in the establishment, in all ranks of life throughout the kingdom, were "friends to the American rebellion," in the same sense that the dissenters were.

Upon the whole, I believe, dissenters have ever been found good, loyal, and peaceable subjects; and for myself I can truly say, I am as "real a well-wisher to the peace and prosperity" of my country at large, and of "this antient city in particular," as Amicus, or any other individual, though——A DISSENTER.
B.

No. 24.

Chester, Oct. 22, 1785.

Fellow Citizens,

HAVING impartially considered the present contest, respecting your rights as Englishmen, and privileges as citizens, I cannot but express my astonishment, that the men now in power, and who owe the attainment of that power to SELF CREATION, should dare to insult the understandings of their fellow citizens, by attempting to establish a charter so intirely repugnant to the constitution of their country, and intended to serve the basest of purposes, that of a deprivation of the freemen's privileges, the right of election. Freedom of election is our common inheritance, and by being deprived of the power of legally asserting our rights, we are exposed to that which is the highest degree of political ruin, the loss of even the remembrance of them. Why may not the house of commons, on the death of a member, with equal propriety say, we will elect one? Would you acquiesce in
such

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such a measure? I am persuaded you would not; why then do those who tyrannically usurp the power, refuse the commonalty a voice in their election? Is it through fear of their not being re-elected? If so, then they plainly tell you they govern by force, and against the will of the commonalty, who are by charter their annual electors; or why do they grasp with such inconsiderate and unjustifiable eagerness at a privilege to which they have no equitable title? What a violation of freedom of election! But they will undoubtedly answer, that annual elections are productive of much disorder and confusion. But this is an evil which a strict execution of the laws now in being would effectually remove.

No disorders are necessarily attendant upon elections. There is not a more certain indication of a bad government, than that one abuse is made to justify another, and if the danger to be apprehended from them, is indeed so formidable, the only effectual remedy against them is to oppress the people with a government as rigid as that which they groan under in France, and other despotic states. Such dangers may alarm the coward souls whom nature formed to be the secure slaves of an absolute monarchy, but they will never make any impression on the men of a free government. Divest yourselves of prejudice, and I am convinced you'll with me see the cause to be that of liberty and justice, and needs not the paltry aids of popular clamour or illiberal invective. Let us then, as citizens, unite for the assertion of our long-lost liberties, in the most dangerous crisis that ever threatened their destruction! Let us reflect that the battle is lost, while every individual consults his own private ease and safety, and those are separately trampled upon, who collectively would be felt in the balance, and incline the scale. Let us join in the common cause, and with one voice assert our claim to freedom, and a firm declaration of those common rights, which are the common defence. Let us contend for our fundamental rights with ardour and with firmness, and there remains not a doubt but they will be crowned with success,

D.

C I V I S.

No. 25.

To the free citizens of Chester,

YOUR firm and manly perseverance (notwithstanding a former discouragement) in the assertion of those rights conveyed to you, as *men*, by the God of nature, and confirmed to you, as *freemen*, by the constitution of your country, is at length crowned with the success it merited. By the exertion of the most shining abilities, and indefatigable industry—after a trial the most solemn, deliberate, and impartial—and by the verdict of twelve respectable and independent Englishmen—your CHARTER, with ALL its valuable franchises, is restored and confirmed, and the odious instrument, by which it had been attempted to be destroyed, is doomed to everlasting oblivion. You have proved yourselves worthy of those inestimable privileges, which are now secured to you, not only by your steady conduct in the hour of disappointment, but by the moderation with which you have met success: and your behaviour, on this occasion, will be instead of a thousand arguments to refute the calumnies of those who would insinuate, that your only aim is to destroy the peace and harmony of the city, while their premature preparations for the celebration of *their* expected victory, do not only expose them to deserved ridicule, but cast back the slanderous charge with ten-fold weight upon themselves. Your success in the cause of freedom, and the rights of your fellow-citizens, might indeed have excused a few honest expressions of transport; but that there can be found men, nay, Englishmen, who, though bound by a solemn oath to maintain them, could have triumphed in their destruction! Good God, is it possible? Charity forbids us to suppose that there are *many* on whom this horrid guilt would rest. The generality of our fellow-citizens, who would have rejoiced on such an occasion, are, no doubt, under the influence of prejudice and misinformation; which, we trust, will be totally done away by a perusal of the TRIAL, wherein the truth and justice of our cause will shine forth to the world in their complete lustre!

Some,

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Some, however, who may be most ready to grant that the claims of our opponents were founded in injustice and usurpation, may have doubts as to the *expedience* of exercising the powers vested in the commonalty by the charter of Henry VII. and it is certain there will not be wanting those who will endeavour to terrify us by conjuring up the bugbears of popular confusion and riot, the unavoidable consequence, they will say, of an annual election of no less than sixty-four persons. This seems to arise from an erroneous construction of the word *election*, to which it is usual to annex the idea of *opposition*, and the putting of one person *in the stead* of another, which is evidently a mistake. A person elected into an office one year, may be re-elected into the same office another year; and so probably will all our corporate officers be, if they discharge their duty uprightly and conscientiously. Or supposing there *should* be an opposition, it may very seldom proceed to a great and serious contest; such contests will scarcely take place but upon very important occasions, nor can they, it is well known, go to any considerable length, unless persons of the greatest consequence and influence engage in them. In the city of London, the common-council are annually elected by the citizens, and yet all is quiet and peaceable; nor do we find that they are willing to part with, or even to forbear, the exercise of this important franchise, for fear of tumults and disorders.

It may, however, be still objected, that the aldermen, being the only justices of the peace in this city, may be deterred from performing their duty in that firm and independent manner which such an important office requires, if they are liable to be removed. To this we will answer, that we cannot readily grant, that the strict and inflexible performance of his duty, as a magistrate, will render an alderman liable to amotion; especially when it is considered, as before hinted, that in order to secure success, it will be necessary for his opponent to engage in his interest persons of the greatest consequence in the city, who are best able to judge whether his conduct has been such as to merit such a mark of reprobation. And on the other hand, if a man, in the place of a magistrate, should shamelessly abandon the dignity and duties of his office, openly profess partiality to a party, and purposely promote riot and confusion, regardless of its fatal consequences—who will not say, it is just that such a man should be removed from a station for which he proves himself so totally unqualified? In short, it may be safely asserted, that if the members of the body corporate will act uprightly and impartially, they will meet with the support of every honest citizen: but if they hold their offices not for the good of the community, but merely to promote the interests of a party, they ought to meet, and we trust ever will meet, with general censure and disapprobation.

Those who have been more immediately concerned in the late legal process, can with all solemnity and truth declare, that their sole object is to settle the peace and concord of this city on solid and durable foundations. And while they avow themselves the determined opposers of that overgrown power and influence, to which the *real* harmony, the trade, the dignity, of this otherwise respectable city, have been for a long series of years undeservedly sacrificed; they repeat the declaration made at the beginning of this controversy, that it is not their aim, were it ever so practicable, to set up one faction upon the ruins of another. An *AMICABLE CONJUNCTION* of parties is their earnest wish, and if such a happy reconciliation should take place, that day will be indeed a day for rejoicing; it will be a triumph, in which every honest man, however he may hitherto have been distinguished, may cordially join—the citizens of Chester will then live together like brethren, in peace and unity. May these bonds of amity be speedily formed, and may the remotest posterity never see them broken!

August 14, 1786.

E.

No. 26.

August 25, 1786.

IT is very certain that the spirit of liberality and free enquiry which prevails in these enlightened days, has contributed much to the success of the citizens of this place,

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place, in their late struggle for the recovery of those rights and franchises which have been so long withheld from them. Party names are in a great measure lost, and *whig and tory* are no longer our distinguishing appellations. A poor and despicable attempt has indeed been made by some (from whom better things might have been expected) to set the old leaven at work again, by raising the antiquated cry of *church and king* ! merely because it has happened that some who have had a principal share in this business are dissenters. Probably no sagacity but that of these doughty defenders of the faith could have found out, that the endeavours of part of the *citizens of Chester* to recover the franchises conveyed to them by Henry VIIIth's charter, were any thing less than an attempt to overturn the *church of England* as by law established ; nor perhaps would any other men think of proving their loyalty to the sovereign of a free people, by trampling on the constitutional rights and privileges of their fellow citizens, under colour of a charter fabricated for the worst of purposes. It is his majesty's glory to reign over a nation of freemen ; nor will any, who have stood forth on this occasion, yield to their opponents in principles of unshaken loyalty and attachment to the illustrious house of Brunswick. Convinced that the perpetuity of our happy constitution depends on the exact harmony and equal balance of all its parts, they will stand up with as much resolution for the just prerogatives of the crown, as for the privileges which they conceive *themselves* legally and properly entitled to :—More than these, as good citizens, they will never desire—with less, it is trusted, no Englishman will ever be satisfied.

E.

No. 27.

Chester, Oct. 1786.

An account of the proceedings on the late election of the mayor, and other corporate officers, of this city.

THE court being assembled, and the usual proclamations made, Mr. Snow (attorney for the prosecutor in the *quo warranto* causes now depending) requested to say a few words previous to the business of the day being proceeded in ; which being granted, he addressed himself to the court as follows :

“ May it please you Mr. Mayor :—

“ By the charter of king Henry VII. confirmed by queen Elizabeth, in the 16th year of her reign, it is directed, that the citizens should *annually chuse twenty-four aldermen, out of whom a mayor is to be appointed* : it seems therefore to result “ as a consequence, and indeed to be absolutely necessary, that these aldermen should “ be, in the first place, elected ; otherwise a mayor cannot be properly chosen at “ all. I am aware, that I shall be told presently, that an usage has long prevailed, “ in the teeth of this charter, whereby *aldermen have been elected by the select body, in exclusion of the citizens at large*, and that they have acted as such *for life* ; and “ on that ground, the privilege we now claim, may possibly still be denied us. “ But in answer to this, we contend, that we are acting under the charter of Henry “ VII. which has, by a late decision, been declared to be the real charter of the “ place ; and after a trial so solemn, before a judge so respectable as sir JAMES “ EYRE,—whose name, I may truly say, is, “ *Clarum et venerabile nomen*,”—and “ a jury of intelligent gentlemen of the county of Salop : can it be said, that this “ charter is obsolete, and nothing more than a dead letter ? No man surely will “ venture to assert it ! In order that the proceedings might be conducted with “ temper and propriety, we delivered to you a requisition in writing, a few days “ ago, that a meeting of the citizens might be called, previous to this time, for “ the purpose of electing the twenty-four aldermen for the year ensuing ; so that “ out of them a mayor might be now chosen, *according to the charter of Henry VII.* “ If doubts should occur, that you may not be justified in such a measure, for want “ of a *precedent*, I have an authority, from your own books, to assert, that it was “ so done, in the time of a most worthy and upright magistrate ; who for four years “ *successively*, sat in that chair, with infinite honour to himself, as well as general “ advantage

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" advantage to this city—I mean COL. ROGER WHITLEY. He thought himself
 " legally authorized to proceed to an election of aldermen, previous to the election
 " day of the mayor—the charter not having prescribed any certain time for choosing
 " them : I therefore submit to you, sir, and to Mr. recorder, whose venerable ad-
 " vice you will undoubtedly follow, that we are intitled to proceed *now* to the
 " election of aldermen, before the mayor is chosen ; for without such election of
 " aldermen, I humbly submit, that no mayor can be now appointed, *without vio-*
 " *lating our charter.* If this is denied us, I shall then, in the name of myself, and
 " of the other citizens who have subscribed this requisition, enter a protest against
 " the election of mayor, in as decent and respectful terms as I can suggest ; for I
 " beg leave to say, that I never will encourage, or give countenance to, any violent
 " or indecent proceedings in this contest ; and indeed I may add, that none such
 " shall ever be committed by any of us or our friends."

Mr. Recorder. " I was determined, sir, not to give you any opposition or inter-
 " ruption, while you were speaking. It is true a requisition for a meeting to elect
 " aldermen has been made, but the matter is yet *sub judice* ; for though a verdict
 " has been obtained, it will probably go farther, before it is finally determined. I
 " have been recorder since the year 1754, and never knew such a requisition made ;
 " nor can it be properly complied with, while the matter is undetermined—whether
 " the charter of the 37th of Charles II. be good, so to warrant our past proceed-
 " ings, will probably be decided before the next annual meeting : as yet it is not,
 " and will go before the house of lords : I therefore could not but have hoped, that
 " nothing of this kind would have been asked, and that nothing would have been
 " done inconsistent with that peaceable disposition which you discovered at the
 " time the verdict was given. If it is hereafter confirmed, you will find every
 " thing as peaceable, *here*, as you would wish ; but as the dispute is still *sub judice*,
 " I think Mr. Mayor cannot be warranted in proceeding at present to an election
 " of aldermen : it never was done, but in the unfortunate times of Whitley ; who,
 " though he might be an honest man, did not observe the regular days of election."

Mr. Mayor was then asked by Mr. Recorder, " Whether he refused the requisi-
 " tion for proceeding to the election of aldermen?" Upon his answering " that
 " he did," Mr. Snow, in his own name, and of the subscribers to the requisition,
 " protested against the election of a mayor.

The election then proceeded according to the accustomed forms ; after which earl
 Grosvenor said,

" I take this opportunity of returning my thanks to my friends, for their attach-
 " ment ; and I congratulate the citizens on their unanimity, on the present election.
 " I hope this day will be a forerunner of that peace and harmony in future, with-
 " out which the city of Chester can never be prosperous and happy. I again con-
 " gratulate the citizens on their unanimity, and hope it will last for ever."

No. 23.

December 1, 1786.

WHAT dispassionate mind can view this tyrannic clause (the power of amoval
 in the charter of Charles II.) and not concur with that exalted character (Sir James
 Eyre) who, upon the late trials at Salop, expressed his sentiments thereon to the
 jury, in the genuine spirit of a British judge, in these emphatic words, " It is im-
 " possible to say, that that was not absolutely reducing this corporation, to be *the*
 " *mere creature of the crown!*"

Can it then be the sense and wishes of the body-corporate, in these days of na-
 tional freedom, to place themselves, their fellow citizens, and their posterity, *for*
ever, in such a *servile* and *dependent* situation, rather than adopt the constitutional
 charter of Henry VII. conferring on *every free citizen* an unbiassed suffrage, in the
 annual choice of those magistrates, who are to decide upon their conduct and pro-
 perty, whenever they may happen to be called in question? These important facts
 being thus publicly disclosed, for the general information of the citizens, who are

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so deeply interested in them, they will, no doubt, instantly take the alarm, at the present crisis, "*whilst yet their liberties and fates are doubtful,*" and, by every moderate, decent, and legal means, express their marked disapprobation of that desperate expedient, by which the election of aldermen and common-council-men is now attempted to be wrested from their hands.—Happily, however, for the independent freemen, that attempt has been, recently, reprobated by the unanimous and solemn verdict of as respectable a jury, acting under the direction of as great and able a judge, as ever graced a court of judicature, in any age, or in any country.—After such an investigation of the right, it might reasonably have been expected, that the body-corporate would have acquiesced and been satisfied; but as they still persist, it seems not improbable, that they may vainly imagine, by protracting the litigation, through every possible stage of inquiry, that their opponents may at length abandon the question.—If such are the sentiments of these gentlemen, let them know, once for all, that as the contest was embarked in from a conviction of the justice of the case, so they who conduct it will not be baffled, in their pursuit, by any obstacles whatsoever, until they have, in common with their fellow citizens, attained, under lawful authority, the FULL EFFECT of the verdicts already pronounced in their favour.

S.

No. 29.

To the citizens of Chester.

AT the present crisis of that important contest, relating to the liberties of this antient and respectable city, in which it has fallen to my lot to take so large a share, I hope it will not be deemed impertinent or assuming, if, in this public manner, I take the liberty to state the principles and motives by which my conduct has been actuated—I do not find myself compelled to this step in order to obviate the misrepresentations of an adverse party, or to wipe off the aspersions of ignorant malevolence—these "I hold extremely cheap." But when I consider myself as the representative of a respectable body of freemen, contending for their dearest and most valuable franchises, I think it incumbent on me to give them every possible satisfaction that my views are such as correspond with theirs, and may justify the high confidence they appear to repose in me; and which (whatever may be the final issue) I shall always look upon as the greatest honour and happiness of my life.

That I have been, in some degree, under the influence of *enthusiasm* in this undertaking, I will not attempt to deny. I am proud to own myself an *enthusiastic* admirer of the constitution of my country. I think it the best that human wisdom could devise, nor would I exchange it for that of any nation under heaven; and I am satisfied that nothing is wanting, to carry it to the highest degree of political perfection, but the free, unperverted operation of its great fundamental principles. Among these FREEDOM OF ELECTION undoubtedly holds the highest rank—And though there are those who assert (I fear with too much truth) that real freedom of election is merely ideal, and, in the present state of things, unattainable; yet when I consider the numerous acts of parliament, by which it is guarded, and the heavy penalties denounced against the violators of it, I cannot but conclude that it is of the last importance to our welfare, as a people; and that in proportion as the intention of these salutary laws can be fulfilled, must be our advances towards the highest degree of public happiness and prosperity. Thus, in the moral world, though perfection is not to be found, yet the nearer men act up to the great law of their nature, the happier they are, and their misery and depravity will always be in proportion to their deviation from it.

Whether the citizens of Chester are in the possession of even the shadow of freedom of election, under a self-created corporation, and with representatives returned by the influence of that corporation, and by their own immediate dependents, let common sense determine. Whether such a situation be favourable to the interests of trade and manufactures, let past experience witness; in particular the violent
opposition

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opposition made to the improvement of the navigation of the river, in 1732, as well as other similar transactions of a more recent date. Surely nothing can be more evident, than that they whose security consists in the *number* of their *dependents*, must be enemies, either secret or avowed, to whatever would create *independence*, which it is the natural tendency of commerce and manufactures to do. This has justly occasioned complaints against corporations in general: yet to attempt to remedy the evil by their total abolition, might be hazardous, and, in present circumstances, unadvisable. It, however, might be, in a great measure, obviated, by forming them upon principles truly liberal and constitutional; and this can only be done by lodging the right of election where alone it can properly be, namely, in the hands of the people at large. How needful such a reformation is, at this period, when, in spite of all discouragements, manufactures are making an effort to establish themselves among us, no man of common understanding needs to be told.

It must have occurred to the most superficial observer, during the course of this long-protracted dispute, that considerable pains have been taken, on *one* side, to bring the public thoroughly acquainted with its merits, and to justify the conduct of those who prosecute it. On the *other*, what answer has appeared? *NONE*—if we except the frequent repetition of those *liberal* phrases—“A parcel of d---d “presbyterians!—they want to see the sword and mace going up Crook’s-lane!” Admitting, for a moment, that our views were to get into power, and to be distinguished by the dignities of office, how do we seek them? Only through the favourable opinion of our fellow-citizens in general, in whose hands we wish to place the power of favouring the deserving, and of discharging those who shall prove unworthy of their confidence; and these, certainly, are no unjustifiable means. For be it known to these sagacious interpreters of our views and conduct, that when we consider these places as held, less for the able, vigilant, and impartial administration of public justice, than to promote the interested views of an individual; and when we look upon the badges of office as not so much the *insignia* of honour as the marks of subjection to his power, we shall treat them, as every honest man will, with contempt. Nevertheless, to remove any apprehensions on this head, I do most sincerely and unreservedly declare, for myself, and I verily believe I may make the same declaration for those of the same religious persuasion, who have happened to join with me in the present undertaking (for it is notorious that there are many who have not) that as we never did, so we never will, directly or indirectly, seek to introduce ourselves into any corporate offices, but cautiously avoid, and steadfastly refuse them. Our highest ambition is to lead quiet and peaceable lives, and to demean ourselves as good subjects and good citizens. But at the same time, we apprehend, it is perfectly consistent with such a character, strenuously to contend for the exercise and preservation of our rights and liberties as *MEN* and *BRITONS*. We know their value too well to desert them in a base and cowardly manner;—either they are worth defending, when invaded, or they are worth nothing.

Were the dissenters of the city of Chester in these days justly chargeable with a desire of intruding into power, they must have greatly degenerated from the moderation and disinterestedness of their predecessors. When king James II. to answer some state purposes, wished to introduce them into the corporation, he issued an order of removal against those who had been incorporated under his brother’s charter, and sent down *another*, containing exactly the same arbitrary and unconstitutional powers and reservations, and inserted in it the names of all the principal dissenters as aldermen and common-council-men: but when called together to be sworn into office, they, *to a man*, refused to act under it! What a contrast between *their* conduct and that of those, who, for the paltry reward of a *scarlet gown*, or a *white wand*, could (with sir Thomas Grosvenor at their head) basely join with Charles II. to destroy the liberties of their fellow-citizens, who were content to become his tools in this dirty business, though they rendered themselves liable to exhibit, at his pleasure, a spectacle of that ridicule and disgrace which they actually underwent, when all at once their dearly-purchased bawbles were torn from them!

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I neither know nor care what the *religious* principles of these men were : I am very little concerned by what denomination *they* may chuse to distinguish themselves who, in these enlightened days, are labouring with all their might to revive these tyrannical and oppressive measures, and to place themselves in the same opprobrious and servile situation : but I cannot say but it affords me some satisfaction to think that not one of them was or is a *dissenter*.

The truth of the matter is, however, that religious opinions have no connection with the present question ; and to introduce them so very improperly, discovers the greatest ignorance and folly, as well as a total want of all sound and rational argument.

On a view of the whole matter, in all the importance of its present circumstances and future consequences, I cannot but express my surprise that so many of my fellow citizens have stood by, as indifferent spectators. One would have thought that as the question *now* stands ; and when the decision is to involve nothing less than the restoring and confirming, or the total extinction, of all their ancient franchises, they would not have suffered so small a number of individuals to sustain the burden of a dispute, in which even every honest member of the body corporate might, with all possible propriety, have appeared openly in defence of his rights, both as a citizen and a corporator. I am still willing to hope that they are only reserving their strength, in order to exert it hereafter with double vigour, if the necessity of the case shall require it. I cannot persuade myself that so righteous a cause will ever be lost for want of support, as I am confident it will never make those ashamed, who, in the trying hour of danger, honestly and warmly stood forth in its favour. To such in particular I would now address myself :

“ I go, my worthy fellow citizens and fellow freemen, in the high and honourable character of defender of your liberties (a character I esteem infinitely above every *other* distinction) exulting in our privilege as Englishmen, that we can submit the justice of our claims to the decision of an impartial judge, and of a jury of respectable gentlemen. If, through the strength and justice of our cause, we are *again* successful, let the same moderation which you discovered on a late occasion, and which, even in the eyes of your opponents, did you so much honour, *again* manifest itself ; and by avoiding every the slightest imputation of a factious and unpeaceable disposition, convince them, that you are worthy to enjoy the blessings you aspire to, and that while you are the zealous friends of liberty, you are no less the determined foes of licentiousness.”

I cannot conclude, without expressing the pleasure it has given me to observe, that so much liberality and mutual good-will have prevailed among the citizens in general, through the course of this dispute, and that a difference of opinion has scarcely, in any instance, interrupted the offices of good-neighbourhood and friendly intercourse. And I hope this is a happy presage of the time when every cause of complaint on either side shall be done away, and when peace and harmony shall be established on the firm and broad basis of UNIVERSAL FREEDOM.

17th March, 1787.

R. EDDOWES.

No. 30.

Henry versus Charles ; or, the danger of premature exultation.

***—HOW natural is it for the mind to believe any thing it would wish !—And nothing in the history of human events could evince it stronger than the joyful acceptance of certain important tidings, on Wednesday last :—The morning of that day had just presented itself, when our “ civil citizens,” and all the furry tribe, emerged from wakeful slumbers, and, big with expectation, turned a longing eye towards the road leading from the Salopian plains, where the armies of Henry and Charles had a second time met, and encamped by mutual consent, to determine the fate of freedom !—About the hour of eight an *aid de camp* arrived with dispatches from each army ; the contents of which were as laconic as that written by Marlborough, after his defeat of the French, on the back of a soldier :—“ The battle is
“ over,

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"over, and we have gained a victory," were substantially the words of both!—These paper bullets, operating differently, carried both a wound and a balm with them; and, for several hours, *the spirit of liberty*, suspended as it were in equilibrium, felt that anxiety which can only be conceived by congenial minds, when placed on an uncertain balance between the hope of *freedom* and the fear of *slavery*!—The trumpet of *fame*, however, sounded louder in favour of the latter, and her blast became more vociferous as the day advanced;—the sweet and dulcet notes of which vibrated so much in unison with the minds of some few of the *sons of slavery*, that their *right hands* involuntarily joined together, and shook, in cordial grips, on the establishment of their *left-handed* charter.—The armies, it was said, had been in the field not less than 19 hours; in the course of which, six engagements had taken place; and as four of them had been fairly won by Charles, and only two by Henry, those who had arithmetic enough to know that the latter is a less number than the former, and who judge only of the *merits* of things by *majorities*, naturally concluded that the defeat of our 7th Harry (of liberty-giving memory) was complete and effectual.—Full of this ideal conquest, the *prime minister* of the bell-ropes of St. Peter had orders to be *under arms*; and the *brazen mouth* of St. John is said actually to have proclaimed the *glorious tidings*, to the soft-tune of the *Banks of the Dee*!—in truth, the supporters of this spurious, illegitimate, *half-hatched*, and *dear-bought* offspring of Charles, were so *possessed* of a decisive victory, that every man, who, unfortunately, has a single *thread* of the spirit of freedom and independence interwoven in his composition, was literally obliged "*to hide his head*." Upon the whole, it was a day of exultation and triumph!—But, alas! how transient and fleeting is all earthly happiness! Reader, mark the sequel: scarce had night drawn her sable curtains o'er the city, when some ill-fated messengers arrived, with intelligence, confirming the account of a victory, but with this *trifling* difference—that *rumour* (O! how fallacious a jade is she!) had given it to the *wrong* side! that the four first engagements had turned out to be nothing more than simple skirmishes; and that the two last were general, effectual, and decisive!!—in a word, that Charles had been completely *ousted*, and that Henry (like his illustrious ancestor at Agincourt) was left master of the field!—If, reader, thou art a Briton, or hast one single drop of free-born blood in thy heart, I am certain it will rebound with joy when thou hear'st this:—if not—and thy attachment is rivetted to a bit of *ermine*, a *white wand*, or a *King's-land house*—thou art worthy thy chains, and I sincerely pity thy insensibility.—

Be this, however, as it may, the muscular affections of Nestor himself must have been moved, had he seen the sudden change, the transposition, of *physognomy* on the occasion—the melancholy visages, chap-fallen countenances, and dismal aspects, of the *supposed* losers, were all at once transferred to those of the *real* ones—*gladness* and *sorrow* had changed sides—and, as states and empires have had their periods of declension, so had this short-lived triumph;—*bilarity* was supplanted by *gloominess*, inasmuch that thou wouldst have thought some of Charles's friends had taken a trip to the *Elysian fields*, with a petition to their favourite monarch for a new charter—and that they had been dubbed, and sent back, *knights of the woeful countenance*.

Upon the whole, disappointment seemed to have blighted the tree of usurpation, and the growing bud of liberty re-blossomed with renovated beauty!—May she continue to flourish with undiminished verdure—may her branches disseminate peace and plenty o'er the city—and her fruit be enjoyed, in the fullest sense, by every true friend to the freedom and cultivation of the soil—is the warm and cordial wish of

Chester, March 24, 1787.

A FREEMAN.

C.

No. 31.

To the mayor, aldermen, and common-council, of the city of Chester.

Gentlemen,

HAVING lately presumed to call the attention of my fellow-citizens *in general*, to the real merits of the dispute concerning the rights of election in this corporation;

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I am

A P P E N D I X.

I am encouraged, by the unmerited approbation that attempt has been favoured with, to address a few thoughts on the same subject to *you in particular*. When the mind is neither elevated with success, nor soured by disappointment, it may be reasonably expected to be the most open to the impressions of truth and sober argument. Such a favourable opportunity seems now to present itself; and if any thing I can offer, shall lead to an amicable conclusion of the controversy, I shall think my time and labour well bestowed, and the ultimate end of the legal investigation which has been entered into, completely answered.

Forgive me, gentlemen, if I suppose, that the defence you have been advised to set up, against the claims of the freemen (I mean the charter of Charles II.) was adopted without properly adverting to the consequences it must necessarily draw after it. Be not offended if I express my belief that it was taken up under an idea, that if your opponents could, in any intermediate stage of the enquiry, be discouraged from proceeding, your point would be gained, without your being necessitated to establish, by a solemn, formal, and final decision, the validity of a charter, framed upon principles the most odious, the most abhorrent from those of the British constitution, and promulgated in times and circumstances, upon which the records of history, and the opinion of all wise and good men, have hitherto concurred in fixing the brand of infamy. You will not think me chargeable with harshness or severity in making this supposition; because I mean by it no more than to express my apprehension, that you have been *ill-advised*, and have, without intending it, been doing the greatest injury, not only to your fellow-citizens (of whose rights and franchises you stand as the faithful conservators) but to yourselves. Suffer me, then, in a few words, to recal to your remembrance that part of the history of our country which relates to the origin of the charter of the 37th year of Charles II.

The licentiousness and extravagance of that reign, are notorious even to a proverb. The king was frequent and importunate in his demands for money; and this, together with the suspicion of his inclination to favour popery, embroiled him at several times with his parliaments. The last and most violent dispute was concerning a bill for excluding the duke of York (afterwards James II.) from the succession to the crown; and the tenaciousness of the parliament on this point, determined the king either to govern without any parliaments at all, or to have such only as should be subservient to his views. With this intention, and by the advice of the infamous JEFFERIES, he instituted process of quo warranto against most of the corporations in the kingdom, in order to deprive them of their antient charters, which, like that of Henry VII. to this city, invested the freemen with the right of electing their principal corporate officers. It is but too well known how much influence, in the returning of members to parliament, corporations possess. His majesty, therefore, having by these oppressive measures got them into his power, issued *new* charters, every one without exception excluding the freemen from the choice of their magistrates, and *reserving to himself a power of turning them out at his pleasure*. Surely it has been well observed, "that this was at once the most arbitrary and effectual stride that despotism ever made towards the destruction of the liberties of this free country;" and it was a perseverance in these measures that contributed more than any thing to drive from the throne of these kingdoms, his unhappy successor, James II. It is true, indeed, that the latter, when he perceived the gathering storm, in order to conciliate the alienated affections of his people, did, by charters of restoration, revive the *old* constitutions of corporations, and vacated their *new* charters. This was at least his unequivocal intention; as such, it was universally understood and accepted; and it is under this idea that the corporation of Chester, and every other corporation in the like circumstances, have, from that moment to the present time, considered themselves as existing and acting by virtue of their antient charters. Who, then, was that hardy man, who, in defiance of common decency—to say no worse—could force you to produce, as valid and subsisting, a thing that for a century past had been considered as totally abrogated, acknowledged to be so even by the very persons in whose favour it had been made,
and

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and urge you to assert and contend, in the face of the world, “ *This is our authority; under this we always have been, and are still, acting; this shall support and give sanction to our claims!* ”

I believe, indeed, the original intention was, to take no more of this charter than would bear you out in the present question, and to leave the remainder in a state of inefficacy and quiescence. But, when once the straight path of rectitude is abandoned, who can tell where he shall stop?—expedients, however big with mischief, are then eagerly adopted. It was soon found, that a *partial* operation of the charter could not be supported; and though that of Henry VII. had been recently and repeatedly pleaded as the charter of your incorporation, it became necessary to maintain—what?—why that this abominable instrument of tyranny was *actually and unequivocally* the CHARTER OF THE CITY; which was in effect to maintain, that all the violent proceedings of Charles II. were *perfectly legal*—and, by consequence, that this and every other corporation in similar circumstances, ought to be, and remain, in the very situation in which by his new charters he had placed them; and that therefore it is right for a prince of the house of Brunswick to reign over his subjects with a power as absolute and despotic as was attempted by the Stewarts, an attempt which cost the last of that unfortunate family his crown and his kingdom.

How little would you recommend yourselves to the favour of your sovereign, by forcing into his hands a power, from the exercise of which he would turn away with abhorrence!

It must be owned, that, by a very ingenious and plausible argument, founded on an erroneous statement in the record of a final judgment of ouster, the court of King’s-bench were induced to give an opinion, on the motion for a new trial, seeming to involve these dangerous positions. But not the least shadow of blame can be imputable to the learned judges, when it is considered, that they were under a necessity of deciding according to what were *then* made to appear as the legal merits of the case, without regard to consequences—*Fiat justitia, ruat cælum*. Mark, however, what would have been the effect, if the charter of Charles II. had been established as the law of this city. All your prescriptive rights must have been annihilated. The records and proceedings of your courts (held in total contradiction to the directions of that charter for a century past) would have been rendered void, and of no effect—and this also must have been the case in many other corporations, who would have been liable at any time to be called to an account for deviating from their charters; and thus, anarchy and confusion might have been spread thro’ the whole nation. Do you not shudder to think, that after having been made accessaries to this complicated mischief, you might have been triumphing, rejoicing, and exchanging mutual congratulations, as if you had gained the most honourable and decisive advantage? Happily for you, however, and happily for the peace of the country, the event of the late trial has averted the danger, and has given stability to the charter of Henry VII. which nothing hereafter will be able to shake or affect.

But I will suppose you had succeeded, in confining the operation of Charles’s charter to the election of aldermen and common-council; even in that case you could not have got rid of the *conditions* of the grant. The *power of removal* reserved to the crown, would remain in its full force, and render you entirely subservient to the caprice of a minister. And the charter incorporating the *inhabitants* as well as the citizens, every inhabitant would have a rightful claim to the freedom of the city, by which the number of voters would be trebled, and the expence of carrying on elections proportionably increased. In short, in whatever light the expedient you have been advised to adopt, be viewed, it must be allowed to be a most unfortunate one, and such as you must inevitably in the end be losers by, even if your point could be carried.

When these proceedings appear (and care will be taken that they *shall* appear) before the eyes of unprejudiced posterity, what comment, think you, will be made upon them? Will it then be said, “ The corporation acted in this business like wise
“ and

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“ and honest men, as the trusty guardians of the franchises of the city, and agreeably to their oath as freemen; they appear to have had the general interest of the citizens at heart, and the support of a party had no share whatever in their views and conduct.” I fear even candour itself will not be able to say this; but whether such reflections may not, in some degree, be applicable to your opponents, may well deserve your serious consideration.

As yet, however, it is not too late to retrieve, what, from past errors, you may be in danger of losing: you have it, as yet, in your power to forbear farther opposition to claims, which, on cool reflection, you cannot but acknowledge to be well founded; and in that case, you may rest assured, that the moderation, which has hitherto actuated your opponents, will not forsake them. They abhor the thought of attempting to set up one faction upon the ruins of another, which would be the certain means of perpetuating strife and discord; and all they aim at, is an amicable conjunction of parties. With respect to myself, gentlemen, perhaps I am too obnoxious a character, to some among you, ever to be accounted worthy of a participation in the honours or emoluments of office. And I entreat you to dismiss all apprehensions of that kind, for I again pledge myself, never to accept them on any terms. The late rejection of the motion for a repeal of the test and corporations acts (an event at which I sincerely rejoice*) may furnish you with an additional security in this particular; and, I assure you, that it is, moreover, my determination to hold myself at full liberty to protest against the conduct even of those whom I now call my friends, who may hereafter fill any corporate offices, if they appear to transgress the laws of moderation and propriety, or to entertain any other designs than those of promoting the tranquility and prosperity of the citizens at large: but it is time I should hasten towards a conclusion.

You profess to have the peace and quiet of the city at heart; and, to secure it, you will endeavour to put a period to all opposition. Alas! gentlemen, this a poor security indeed! When power is all on one side, Englishmen will naturally look upon it with a jealous eye; the unexpected perseverance with which the present contest has been, *and, if necessary, will yet farther be, supported*, may serve to convince you, that their spirit, when forcibly kept down, will, like the principle of elasticity in mechanics, be continually making an effort to throw off the weight that oppresses it. *This* experiment has long been tried without success—a repetition of it will meet with no better fate: be persuaded then to adopt one of a different kind, and act the manly part of acknowledging, that the old system was founded in error. You cannot *now* plead ignorance of the merits of the case—it can be no disgrace to any man to yield to the force of conviction—and it will be your wisdom to endeavour to secure what you must probably hereafter depend upon for your support, namely, the approbation and good opinion of your fellow-citizens in general.

3d April, 1787.

R. E.

No. 32.

It is good to be zealously affected in a good thing.

THERE is a sort of men who can be active enough in pursuit of private interest, but when their country is divided into parties, and civil discord runs high, instead of espousing what they know to be a good cause, they think it a wiser plan to wait, and see which side will prevail, in order to join the successful one. If I don't mistake,

* As I have, since the date of this paper, joined in a farther application for the repeal of these acts, it becomes necessary to explain my motives for so doing. I rejoiced in the rejection of the motion at *this* time, because I was convinced (as I still am) that the repeal of these laws, and the admission of dissenters to places of trust or profit, would, in a short time, prove highly injurious, if not totally destructive, to their interests as a *separate* description of men. But I have since considered the matter in a more enlarged view—and taking it upon the broad ground of constitutional and equal freedom (with which no *particular* interest ought to interfere) I have cordially given my voice for the repeal.—The narrow and short-sighted policy of our rulers, and the astonishing insatiation of the majority of the nation, may probably protract our existence as dissenters, as long as the most zealous partizan among us could desire.

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mistake, this observation has been occasionally verified in the conduct of some of the freemen of this antient city.

The excuse generally made by these men of more caution than virtue is, that "they withdraw themselves because they can do no good;" but if these cowardly sentiments had possessed all men, at all times, no country could long have preserved its liberty; for national points of the utmost consequence have often been carried by a majority of one voice. A writer of our country had discussed this point long ago, and examined whether an honest man can remain neuter in times of faction. Solon, says he, seems fully to have decided upon it, when he made a law which noted with infamy such as in civil sedition stood neuter. Plutarch observes, he designed thereby, that private men should not regard their own particular affairs, or their own personal security, so as to abandon their concern for the public; but, in the very beginning of the contest, should declare for those whom they conceived to have the justest cause, to lend that side all their assistance, and run its fortune.

But what say the wise men of our day? Why, in direct contradiction to Solon, they tell you it is no part of your business to attend to the right or the wrong of the matter in contest; you are only to consider how you can most effectually serve your own private and personal interest by the part you take in it; and, like "wise men in your generation," act accordingly. This is a scheme of political doctrine which is at this time propagated with much zeal and assiduity by a certain description of men within this city, who possibly may be conscious that very little can be urged in defence of their cause, on the score of merit. But as much as these creeping and unmanly sentiments are disseminated amongst us, it is pleasing to observe, that great numbers of our worthy freemen, rising superior to such sordid considerations, retain their public virtue in its liveliest vigour, and fairest lustre; and most certain it is, that some few individuals (natives of this place) have distinguished themselves so remarkably, as true patriots, that they would do honour to any age, or any country.

C I V I S.

October 19, 1787.

B.

No. 33.

A word in defence of the corporation.

I CAN forbear no longer!—Freeman! Guardian! Citizen! Englishman! Impartialist! Q. in the Corner! Amicus! where are ye? Shall these restless sons of freedom, to subdue whose audacity it has cost (*when all is paid*) no less than twenty thousand pounds, boast their arguments unanswered? Can you endure to see your trusty and well-beloved friends, the corporation of Chester, disturbed from a repose of fifty years? Must the venerable veil of dust and cobwebs be shaken from their records, those precious *remains* of antiquity; and must they be dragged from the solemn recesses where the friendly teeth of time * and the rats would ere long have consumed them? Exposed to *prying*, curious eyes, must they be forced to bear testimony against their past and present possessors? and shall none protest against the horrid sacrilege? In a case which so loudly calls for defence and vindication, shall not *one unfeared* advocate appear?—Come forth, ye formidable phalanx of election squib-throwers, whose ingenious compositions sparkle in the concluding pages of the poll-book, and once more exert your powers.—But, alas! I may as well "*call spirits from the vasty deep*;"—on me, and me alone, the task devolves, and thus in brief I discharge it.

The accusation against this venerable body is, if I am rightly informed, "That though they now pretend to justify their mode of electing into the offices of alderman and common-council-man, by the charter of Charles II. yet they have for near a century past, in other instances, totally disregarded it, and professed to be governed by the charter of Henry VII."

Now

* *Tempus edax rerum.*

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Now I will maintain, *manibus et pedibus, unguibus et rostro*, that they never have, in any part of their conduct, departed from the *spirit* of this most famous charter, but have most scrupulously and religiously fulfilled its intentions. For what purpose, I should be glad to know, did sir Thomas Grosvenor, that truly patriotic citizen—that friend to freedom of election—in a word, the father, peacemaker, and deliverer of his country,—why did he purchase this charter (at half the current price) from that great and pious monarch (of blessed memory) but to secure to himself and his descendants the *honour* of representing the city of Chester in parliament? And which of our modern *upstarts* will be hardy enough to deny, that what a man buys with his money, he has a right to call “*his own*?” Now by the antient feudal law, when a man had bought an estate, the vassals and villains appertaining thereunto, were considered as part of the property, and descended (and their posterity too) from heir to heir, along with it. Thus, the corporation being by the *golden* charter annexed to the representation of the borough, their successors have hitherto continued, as it was meant they should, in faithful and true allegiance to their rightful lords and owners—here was as fair a bargain and sale as ever was made of a drove of *quadrupeds* at horn-and-hoof fair; and yet these wicked sons of freedom, without any respect for the solemnity of such a contract, are going about to deprive the proprietor of the benefit of the purchase!

If such has been the zeal and attention of my worthy clients, in fulfilling the great end of their institution under the charter of Charles II. it would be ungenerous and uncandid in the extreme, to put an unfavourable construction on their departure from the *letter* of that charter in some points of *less* moment—And yet it has been insinuated, that no such thing would ever have happened, if they had been conscious that it was a valid instrument, and sufficient to give a sanction to their proceedings—Thus it is, that actions arising from the best principles, are liable to misrepresentation—how unfortunate, that people should incur censure and reproach, merely for their *modesty* and *moderation*! It is allowed, there *had been* such a *thing* as the charter of Henry VII. and it was natural to suppose, that some of the citizens might have prejudices in its favour; which, indeed, was evident enough, by the ready and peaceable acquiescence of a large majority of them, in the regulations made for the electing of aldermen and common-council men, conformably to its provisions, during the usurpation of that arch-rebel, Roger Whitley. But a *better kind of peace and harmony* being introduced, by the restoration of sir Thomas Grosvenor’s worthies to the offices of which they had been so wrongfully deprived, those upright and discreet personages modestly declined any open and triumphant assertion of their title under Charles’s charter, and prudently contrived a method of fulfilling its design, and maintaining their fidelity to their patron, without doing violence to the feelings and prepossessions of their fellow-citizens. As the mayor must of necessity be chosen from among the aldermen, what harm could there be in letting the *freemen* elect him, while the *previous* choice of aldermen was secured to *themselves*? And as to the sheriffs, there was no danger in relinquishing the right of naming *both*; since if he who was elected by the citizens at large, was likely to prove a disturber of the peace and tranquility of the corporation, it was an easy matter to prevent his admission into the council. And thus, by this moderate, prudent, and conciliatory plan, the provisions of Charles’s charter were secured, and no violence done to the prepossessions of those who might not chuse entirely to part with that of Harry the seventh.

Thus have I made it sufficiently manifest, that these worthy gentlemen have always studied the ease and quiet of their fellow-citizens, nor ever insisted upon any privileges under *their own* charter, but such as they could not *safely* give up. They never meant to make an ostentatious display of it in the eyes of the world, notwithstanding the beauty and elegance of its external appearance, nor to boast of the equitableness and convenience of its provisions, till forced to it by the impertinent and unreasonable disturbance of their persecutors and tormentors. Nay tho’ *compelled* openly to take their stand upon it, still have their warmest and ablest advocates

spoken

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spoken of this glorious charter, in the most modest and selfdenying manner. On the last trial, at Shrewsbury, I am well informed, that their leading council made use of something like the following expressions: "As to the charter of Charles II. *"kick it, curse it, abuse it,* do what you please with it—*my client* joins me in the *"most hearty disapprobation of it."*—Such was the language of men who were exerting every possible effort to establish and confirm this excellent charter; and such I will venture to pronounce is still the moderation of the present select body, and so averse are they to putting matters out of their old and accustomed course, that tho' they were told from the seat of justice, that they are "liable to be punished by the crown, for deviating from *their* charter," yet they will *this very day* go in grave and solemn procession to the Town-hall, and again elect the mayor and sheriffs in flat contradiction to its injunctions. I confess I am lost in astonishment at such exalted virtue, such unexampled patriotism!—Not content to submit with unheard-of meekness and taciturnity to the impertinent reflections of every puny scribbler, they are even willing to run the risk of punishment and disgrace, rather than rigorously insist upon all the exclusive privileges to which they are intitled, under their beloved charter!—their enemies may put what invidious constructions they please upon the conduct of these extraordinary men, but I insist upon it that they are objects of admiration!

I am truly grieved that the narrow limits of such a publication as this, will not allow me to do complete justice to a subject which might be so copiously enlarged upon, and that I am obliged to quit it so abruptly, in order to leave room for a *word of rebuke* to these pertinacious ticklers for Harry *versus* Charles—these seekers for a new corporation in an old charter—Ye assertors of freedom of election, in other words, ye introducers of mischief and confusion, ought ye not to be alarmed at the innovations your conduct has already occasioned?—Have you not obliged a worthy member of this corporation to neglect concerns of the utmost importance in a distant county, laid him under the necessity of attempting *extempore* speeches in the Common-hall, and of appearing in the character of chairman of a six-penny club? and all this for the preservation of an interest which was once thought too firmly established to require such awkward and disagreeable methods of support?—Prove to me, if you can, that such things ever happened in the memory of any man alive, and you shall stand excused—Ah! ye egregious blockheads, are ye aware what it is ye lose by your ill-advised proceedings!—No more to you comes Mr. *Molyn*, cap in hand, with Mr. Mayor's complimentary card of invitation to the annual feast. For you no more shall the fair and skilful fingers of Mrs. *Jackson*, prepare the high-relished ragout, carve out the ornamental crust, so nicely and temptingly brown, or raise the lofty transparent pile of whips and jellies!—think yourselves happy if you are admitted with little masters and misses, to view the well-arranged board at humble distance, but dare not to indulge the vain hope of partaking of its dainties—No! no! get home and dine soberly with your wives and families; or go to your two-shilling ordinaries, and listen to the fine speeches of your *Erskines* and your *Toppings*, but never hope to hear the animating "*Gentlemen make ready!*" in the sonorous voice of Mr. *Clayton*. Be wise, repent of your deeds, and all may yet be well. Would any reasonable man desire more liberty than to eat and drink his belly-full? and surely if you may do this at the expence of the corporation *every* year of your lives, you may well allow *them* to return members to parliament once in *seven*.

It would give me infinite concern if the respectable body whose cause I have thus undertaken, should think I have failed in doing them complet: justice: all I can say is, that the task being forced upon me, I have fulfilled it as well as I am able—The pen, like the razor, in the hand of an unskilful operator, is apt to occasion wry faces, when nothing more than a *decent trimming* is intended, especially if the lather has not been properly worked up; nor, to say truth, do I expect they will ever appear as they should do, till old Harry has had them *completely in the fuds*.

SAM. SHAVECLOSE.

October 26, 1787.

E.

A P P E N D I X.

No. 34.

To the worthy freemen of the city of Chester, who, acting consistently with the oath they have taken, stand forth as the firm and zealous defenders of its liberties.

My worthy friends:

MY motive for attending the giving judgment in our cause in the court of King's-bench, was, that I might immediately consult our counsel on the subject of it, if it should prove unfavourable. This, I have lost not a moment in doing: and I now inform you, that they have expressed their dissatisfaction with the judgment given, in such terms, that I should have deemed myself rather the betrayer than the defender of your franchises, if I had hesitated a moment to form my resolution; and the manly firmness you have discovered in every past stage of this important business, would have reproached me with cowardice and pusillanimity, if I could not have prevailed with myself to trust it *once* more, in order to carry the cause to its final determination, in a higher court:—I HAVE THEREFORE LEFT DIRECTIONS FOR SUING OUT A WRIT OF ERROR.

The question is, indeed, of that national magnitude,* that one might say, without impropriety, that the highest court of judicature in the kingdom is alone competent to decide *finally* upon it. It shall not then be said of us, as it has been of our predecessors in the year 1733, that “if we had gone *one* step farther we might have succeeded.” If after having done all that men could do, we should at last fail of success, we shall at least stand acquitted to ourselves, to our country, and to our posterity. For there is this great distinction between *our* cause and that of our opponents, that it will in any event do us honour as men, as citizens, and as Britons; while success itself on *their* part can only serve to embarrass and degrade them.

June 4, 1788.

R. EDDOWES.

No. 35.

Chester, June 6, 1788.

ON Monday last, Mr. Justice Ashurst pronounced the judgment of the court of King's-bench, for the defendants, Amery and Monk, in the long-depending cause in *quo warranto*, respecting their titles to their offices in the body corporate of this city.

This judgment, if unreversed, *by establishing the charter of Charles II.* will entirely put an end to the elective rights of the citizens of Chester, who from henceforth will have no voice in the election of any one of their corporate officers, and against whom the doors of their common-hall will be for ever shut. Their mayor and sheriffs, as well as their aldermen and common-council, are to be appointed in *secret*, nor must they ever dare to call in question any of the proceedings of their perpetual lords and masters; yet not properly *perpetual*—they may at any time be removed, *one by one*, at the mere will and pleasure of the crown, without any cause or reason assigned; and thus is the corporation (in the words of the present lord chief baron, on the first trial at Salop) “absolutely reduced to be the mere creature of the crown.” Will our countrymen believe that there are beings, in the shape of *men*, stupid and groveling enough *publicly to rejoice* at being placed in such an abject and disgraceful situation?—Yet nothing is more true. *O! shame, where is thy blush? Spirit of Englishmen, whither art thou fled?*

But these are only part of the blessed effects of their present success: it is easy to foresee to what innumerable inconveniencies* they must be exposed by the irrecoverable loss of their prescriptive rights—which in any litigation can avail them no more; nor will they be able even to preserve the right of toll any longer than the public forbear to dispute it with them; so that the observation of the learned judge above-mentioned, is still literally just, “that the ground on which they have chosen to rest their defence is a very unfortunate one, for it is impossible not to see, that the charter of Charles II. granted in so inauspicious a time, is the last expedient that any one would have resorted to but in case of absolute necessity.” Nor will it be at all surprising (when the fumes of the intoxication occasioned by

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ideal success are a little dissipated) if they should vote the prosecutor their thanks, and offer him liberal assistance, in the proceedings on the writ of error, which it seems to be his determination to prosecute, whereby they have a chance of being reinstated in the possession of those valuable privileges, of which they have thus madly been endeavouring to strip themselves.

E.

No. 36.

ON my return from London I informed you, that having collected the opinion of our counsel respecting the judgment given in our cause by the court of King's-bench, it appeared to me indispensibly necessary to adopt the resolution of appealing from that judgment to the house of lords.

It might be supposed by some persons, that this resolution was taken up *hastily*, and that, upon maturer reflection, it would be abandoned. And it must be owned, that a step so very important ought not to be taken without a thorough conviction of its necessity, and a rational prospect of success. The time which has elapsed since the pronouncing of the judgment, has, therefore, been diligently employed in investigating the authorities upon which it was founded; and I can now no longer delay to tell you, that our counsel are unanimously and decidedly of the same opinion as at first, and that, on every view of the case, whether as a legal question, or as involving consequences of the utmost importance to the nation in general, as well as to the city of Chester in particular, it ought to undergo a farther discussion before the highest court of judicature this kingdom knows.

That my fellow-citizens might be, in some measure, enabled to judge for themselves as to the necessity of this proceeding, I have put into their hands the *CHARTER*, which, if the judgment be acquiesced in, is in future to be the law by which they are to be governed, and which all persons who may hereafter become citizens (I cannot call them *freemen*) are to take a solemn oath "to maintain with all their might and power."

I believe, then, I may safely appeal to the understanding and the feelings of every honest and sensible man, whether the system of government established by the charter of Charles II. be not totally subversive of every principle of freedom; and whether it does not leave the inhabitants of Chester, and their concerns, entirely at the mercy of an arbitrary power? If any one of them dares to disoblige his self-created rulers, they may harass him by continual persecutions—they may distress him by fines—they may cramp his exertions in trade, under the pretext of *regulations*—they may depress him by partiality to his rivals, who happen to be their favourites—and may finally render it impossible for him to remain in the city; in a word, the citizens are thrown as entirely into the hands of the corporation, as the corporation are into those of the crown. Is this a condition tamely to be acquiesced in by those who call themselves *freemen*? If they are to be the slaves of slaves, is not this the very essence of slavery?

The bare idea of establishing this charter, is so odious, that you find the corporation themselves have never dared to justify their adoption of it, by any kind of argument. I give them all due credit for their modesty; and think it highly meritorious that they have not, in imitation of their predecessors who procured it, erected a tablet over the pentice door, with an inscription, importing, that "the *new charter* is acceptable to all good men." On the contrary, the mode at present adopted, is, to hush up and gloss over past transactions, and to lull you into a state of indifference and security, by persuading you that no innovations will be attempted:—nor perhaps will any such attempt be made, while they meet with no opposition;—suffer them to have their own way, and possibly all may go well. But what would be the consequence if you were to rouse this dormant power, by any attempt to assert the rights which you may imagine yourselves possessed of, as men, or Englishmen? Think you that the paw, which now appears so soft and smooth, would not then suddenly shew its talons, and make you feel the sharpness of its gripe? Only suppose that the corporation had known themselves to be pos-

essed

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essed of the powers given them by this charter, at the conclusion of the late election, and then say, impartially, whether you think they would have exercised them or not? And *should* they, upon any future occasion, so exercise them, where is your remedy? Your *elective* franchises are all extinguished! you have no power to call your oppressors to any account! Secure in their places, and backed by their *charter*; they may smile with contempt at all your complaints; and every endeavour to shake off your chains, will only draw them so much the closer!

If such then be the situation in which the judgment leaves you, and there were no more than a mere *possibility* that by a single effort more you might emancipate yourselves, are you not called upon by every important and valuable consideration to make that effort?

I shall now take a more extended view of the case, as it seems to apply to other corporations, and may eventually affect the liberties of the whole kingdom:

The question, as it now appears on the record in *The King against Mr. Amery*, stands thus:—The corporation of Chester, being called upon, by King Charles II.'s attorney-general, to shew by what authority they claimed to be a corporation, did not *appear* to make any plea—whereupon judgment was given, *that their liberties should be seized into the king's hands, till the court should farther direct*. It has been generally understood, that this judgment (called *interlocutory*) was merely to *compel them to appear*, and replevy their liberties; and that, till some farther process was had, and a *final judgment* given, the corporation were virtually in existence, and capable of accepting a remission of the *interlocutory judgment*; and that, since *two* of these bodies cannot subsist in the same place at the same time, the crown could not legally create *another corporation*, by issuing a new charter. In this case, however, though there was no final judgment, yet the crown *did* grant a new charter, (which is this of the 37th of Charles II.) and create a new corporation under it. Not long after, the circumstances of the times rendering such a measure necessary, the interlocutory judgment was pardoned, a charter of restoration issued, and the old corporation re-established in their offices; by all which it was fully understood, that the new charter (if it even *had* a legal existence) was vacated. The judgment of the court of King's-bench on this case, is, that the old corporation might be dissolved, not only *without* a final, but by the interlocutory, judgment; that consequently the new charter was lawfully issued, and that the subsequent charter of restoration could not operate, being directed to a body which had no existence; from whence it follows, that the charter of Charles II. is the only one under which Mr. Amery can or ought to claim title to his office. If this judgment be unimpeachable, it is clear, that the present corporation of Chester, and those of several other boroughs, who, since the charters of restoration, have acted under their ancient constitutions, have, for these hundred years past, been acting under an invalid authority, and must of course revert to the charters imposed on them by King Charles; which are all precisely of the same arbitrary and oppressive tenor. And of other corporations, whose ancient constitution *was* regularly and legally restored, it is obvious to remark, that if the crown should ever be disposed to take away their liberties, it has only to call upon them (without assigning any fault or delinquency) to shew by what authority they claim to be corporations, and, by means which it can never want, to prevent an *appearance* being made, and the business is done at once—they are completely dissolved without farther process.

As I have frequently had occasion to mention, in warm terms of disapprobation, the times, the circumstances, and the principles, which gave birth to these charters of Charles II. I wish you to believe, that my ideas of them have not been formed upon party prejudice, or arisen from a heated imagination, but have been taken from the concurring opinion of historians and lawyers, who have treated of the events of that period: suffer me to produce some of them for your satisfaction and conviction:—

' England is almost all divided into communities called corporations, which have each their privileges obtained from the sovereign on certain conditions. There is scarce a town which has not its magistrates and laws as a corporation. The
' mayor

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mayor, or head of the corporation, the aldermen, the recorder, and other principal officers, are elected, either by the whole community, or by a certain number of townsmen. It is easy, therefore, to apprehend, that the prevailing party may, without great difficulty, form a common-council of their own principles. But in chusing representatives, another method is taken; for then, every burgess, every freeholder, has a right to give his vote; and consequently representatives of a contrary party to the magistrates and common-council, may very possibly be elected. The court, therefore, came to a resolution of refusing the charters of the corporations, and to grant others, drawn in such a manner, that the king should be almost enabled to cause such representatives to be chosen as he pleased. It may be affirmed, there was no readier or more effectual way to invade at once the liberties of the nation, and cause the parliament itself to approve of the same."—*Rapin*, vol. 2. p. 726.

The charters of the city of London, and other corporations, stood in the way of an absolute government, and it was resolved to break through this barrier. In order to which, *quo warrantos* were brought against them; and, in process of time, they were either surrendered by the corporations themselves, or vacated, in Westminster-hall, by a set of judges picked out for that purpose.

And it was resolved thereby to make one of the estates of parliament depend entirely upon the will and nomination of the prince. While these *quo warrantos* were going on, whole peals of anathemas were rung out against those patriots that had stood up for the liberties of their country in the preceding parliaments; and it was looked upon as a crime against the state for any one to regret the approaching fate of his country. This was a time never to be forgot, when to wish well to our country was a crime, and when heaven itself was ranked upon our enemies' side, by those who pretended to expound its will."—*Kennet*, vol. 3, p. 405.

Lord Chief Justice Jefferies, in the midland circuit, made it his great business to terrify the people into this compliance (surrender of their charters) and, at his return, he waited on his majesty at Windsor, and delivered up to him the charters of the city of Lincoln, and of several other corporations within his circuit, as an oblation of his own loyalty, and a triumph over the people's liberties."—*Ibid*, p. 423.

Filled with consternation at the fate of London, and convinced how ineffectual a contest with the court would prove, most of the other corporations in England surrendered their charters into the king's hands, and paid large sums for such new ones as he was pleased to frame. By these means, a fatal stab was given to the constitution. All offices of power and profit were left at the disposal of the crown, and as more than three-fourths of the house of commons were then chosen by the boroughs, the court was made sure of an undisputed majority. A perfect despotism was established."—*History of Modern Europe*, part 2, vol. 1, p. 431.

All the corporations in England, having the example of London before their eyes, saw how vain it would prove to contend with the court, and were, most of them, successively induced to surrender their charters into the king's hands. Considerable sums were exacted for restoring the charters, and all offices of power and profit were left at the disposal of the crown. "It seems strange that the independent royalists, who never meant to make the crown absolute, should yet be so elated with the victory obtained over their adversaries, as to approve of a precedent which left no national privileges in security," but enabled the king, under like pretences, and by means of like instruments, to recal anew all those charters which at present he was pleased to grant. And every friend to liberty must allow, that the nation, whose constitution was thus broken in the shock of faction, had a right, by every every prudent expedient, to recover that security of which it was so unhappily bereaved."—*Hume*, vol. 8, p. 180.

During the violent proceedings that took place in the latter end of the reign of king Charles II. it was, among other things, thought expedient to new-model most of the corporation towns in the kingdom; for which purpose, many of those bodies

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'bodies were persuaded to surrender their charters; and informations, in the nature of *quo warranto*, were brought against others, upon a supposed, or frequently a real, forfeiture of their franchises, by neglect or abuse of them. And the consequence was, that the liberties of most of them were seized into the hands of the king, who granted them fresh charters, with such alterations as were thought expedient; and during their state of anarchy, the crown named all their magistrates. This exertion of power, though perhaps in *summo jure*, it was for the most part strictly legal, * gave a great and just alarm; the new-modelling of corporations, being a very large stride towards establishing arbitrary power, and therefore it was thought necessary at the revolution to bridle this branch of the prerogative, at least so far as regarded the metropolis, by statute 2 W. and M. c. 8, which enacts, that the franchises of the city of London shall never be forfeited again for any cause whatever.'—*Blackstone*, vol. 3, p. 263.

'We know the obloquy which charters granted at that time lie under. As my lord Hardwicke said, they have never received any countenance in Westminster hall, and he would never give an opinion in support of them, unless the strongest evidence in the world was laid before the court, of their having been accepted and uniformly acted under ever since.'—*Lord Mansfield, on the motion for a trial at bar in the Chester cause; Reports of Trinity term, 1786, p. 367.*

'After the defendant, and those who have advised him, have examined as carefully as they could into the grounds upon which they might rest this election, they have at length been obliged to make choice of a very unfortunate one; for it is impossible not to see, that this charter of Charles II. granted in so inauspicious a time, and under such unfavourable circumstances, is a sort of ground that is the last which any one would have resorted to, but in a case of absolute necessity. This corporation was one of those against whom that unfortunate measure was put in practice, of filing an information in the nature of a *quo warranto*, with a view to procure, by some means or other, either the absolute destruction of the corporation, or to enforce a surrender of it; in short, to get the power of this corporation, among others, into the hands of the crown.'—*Lord Chief Baron Eyre's summing up to the jury, on the first trial of this cause.*

'I am ready to confess, that what they' (*Lord Hardwicke, and the other judges*) 'said, was true; that is to say, that these charters, granted in the time of Charles II. are very suspicious.'—*Mr. Bearcroft's reply on the first trial.*

'That point' (*meaning the mode of election of aldermen*) 'is the whole we insist upon; as to the rest of the charter—abuse it—kick it—curse it—do what you please with it—I join most heartily in it, and so does my client, and every man that has any thing to do with it.'—*Mr. Bearcroft's reply on the second trial.*

Though I firmly believe that the more liberal and enlightened policy of the present times, will prevent a repetition of these dangerous and destructive measures; yet who can answer for what shall happen in future? A good king, an upright minister, will deprecate the possibility of such a power being thrown into his own hands; much more into those of his successors. And if I might for a moment be permitted to suppose, that the august assembly by whom this cause is finally to be decided, would look at any thing beyond the legal merits of it, I would presume to hope, that they will think it their duty, as constitutional mediators between the crown and the people, to guard, as much as possible, against the danger of an interference, which might strike at the very being, as well as the independence, of the lower branch of the legislature.

If, then, it plainly appears, that this is a question not merely affecting the liberties of the citizens of Chester, but those of the nation at large, am I unreasonable in

* *Summum jus summa injuria*; and the very qualified expressions this respectable writer makes use of, as to the legality of these proceedings, are a plain indication what his opinion of them was. To this it ought to be added, that the preamble to the statute, 2 W. and M. expressly declares the judgment against the city of London to be *arbitrary and illegal*, although specific causes of forfeiture were alleged, and proved upon that record; which, in the case of Chester, were not even pretended.

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in hoping, that I shall receive *general* encouragement and assistance, in carrying it on to a final determination? Some generous offers of this kind, from old and tried friends, have already been made, and they are sufficient to warrant me in adhering to my resolution of pursuing the business: but it neither can nor ought to be concealed, that much more assistance would be extremely seasonable; as it is well enough known upon *what individuals* the heaviest part of the burden has hitherto fallen. Whatever help may possibly be obtained from other quarters, my chief expectation must and ought to be from the *citizens of Chester*—with regard to them, the question is now at an awful crisis—it is not merely whether they shall obtain privileges which they had not before, but whether they shall be left in possession of *any at all*. I know many friends to the cause, who have hitherto promoted it only by their good *wishes*; they surely will now, in this its *final* stage, not refuse to give it a more *substantial* support. However, I would have it understood, that I shall make no *particular* or *personal* applications for this purpose: for if they whose rights I am asserting, do not chuse voluntarily to afford me that which I might honourably *claim*, I shall never stoop to ask it as a *favour*.

I have often lamented, that a cause, which would have done honour to any man of the highest rank and fortune who would have appeared at the head of it, should suffer, *as it probably has*, by being connected with a name so insignificant as mine. Yet, if that name has procured it no advantage, I trust my conduct has at least done it no discredit. Accustomed to look with reverence and admiration on the laws and constitution of my country, and to consider the liberty which is the offspring of that constitution, and guarded by those laws, as the first and dearest possession of an Englishman, I have not scrupled to sacrifice *something*, nor to encounter *some* anxiety, fatigue, and disappointment, in its defence. My actions may *now*, very possibly, undergo the malevolent misconstructions of party. I shall, therefore, take sufficient care that they appear in a proper light before the eyes of an impartial *posterity*, who will make me ample amends, if they ever mention me in connexion with the revered name of WHITLEY. But the censure of enemies, or even the approbation of friends, are not, with me, matters of primary importance, while my conscience, upon the most impartial scrutiny, acquits me of any unworthy, self-interested, or ambitious motive, and will at all times, and in all circumstances, still suggest the pleasing reflection—That

I have acted right!

July 4, 1788.

R. EDDOWES.

No. 37.

State of facts relating to the franchises of the city of Chester, and of all other corporations in the kingdom.

IF it be, as it certainly is, with the utmost propriety that the people of Great-Britain commemorate, at this era, the REVOLUTION which rescued their most valuable privileges out of the hands of arbitrary power, and was intended to establish their future security on a legal foundation, it may be presumed, that the same patriotic motives will engage them to pay an earnest attention to any circumstance or event which may appear to clash with the principles of that revolution, or to affect the ground on which the freedom of the subject has ever since been supposed to rest. Of such an interesting nature, it may be confidently affirmed, is the present situation of the CITIZENS OF CHESTER, with respect to their *charters* and *franchises*. And when it is seen how nearly that of other cities and boroughs resembles it, no apology will be expected for submitting it to public consideration.

By their ancient charters, the citizens of Chester were invested with very valuable and extensive powers in the elections of their magistrates, which the *select body* of mayor, aldermen, and common-council, have, from very early times, and by laws of their own framing, contrived to circumscribe within such narrow limits as were contrary both to the letter and the spirit of those charters, but which suited the purposes of their own ambition. The practice of *electing each other* (of late so justly complained

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complained of in the Scotch boroughs) has given occasion to several disputes between them and the freemen at large; and in a contest of this kind, now depending, the corporation of Chester have thought proper to shelter themselves under a charter, dated in the latter part of the reign of Charles II. which confirms this power of self-election to an extent utterly subversive of every principle of constitutional freedom.

Of the transactions of that period, when so dismal a cloud hung over the religion and liberties of these nations, history has drawn a melancholy picture, which it is by no means necessary here to present to the public eye, at a time when the great and glorious event to which they owe the happy change in their circumstances is so immediately in their recollection. Let it suffice to observe, that the seizing on the liberties of corporations, and imposing on them new charters, which by reserving a power of removal to the crown, threw them entirely into its power, has been justly termed, "the most alarming stride that despotism ever made towards the destruction of the liberties of this free country;" and was one of those measures which, at and after the revolution, were most severely censured. In order to prepare a legal ground for the erection of these engines of arbitrary power, some corporations were either terrified or cajoled into a surrender of their old charters; and against others, informations, in the nature of *quo warranto*, were exhibited, and judgments of forfeiture given. Of this number was the corporation of Chester; who being called upon by the king's attorney-general to shew by what authority they claimed to be a corporation, *made no appearance* to the information, and judgment was thereupon given, *that their franchises should be seized into the king's hands till the court should farther order*. This interlocutory judgment was not followed up by any *final judgment* entered of record. The new charter, however, was passed, and being introduced into the city with great parade, backed and supported by the appearance of a military force, was acquiesced in and acted upon (though only a very small number of the citizens took up their freedom under it) till the eve of the revolution. Then, indeed, matters took a different turn. The unfortunate James II. wishing to tread back those ill-advised steps which had brought him to the brink of destruction, did every thing in his power to replace the corporation on their former footing. To this end he issued a proclamation, discharging (in consequence of the powers reserved to the crown for that purpose) all officers created or elected under the new charters, and commanding the former magistrates to resume the exercise of their functions. Further to perfect his intentions in this respect, he granted *charters of restoration* to all boroughs whose surrenders, or the judgments against them, had been entered of record, and under these authorities all corporations so circumstanced reverted to their former situations; and have, to the present time, considered themselves as subsisting by virtue of their antient charters.

The contest between the corporation and the citizens of Chester, is, in substance, whether the old charter granted by Henry VII. or the new one of Charles II. is to be the law of that city? After two trials, and a very elaborate argument of four days continuance, in the court of King's-bench, the points on which the merits of the cause rested were briefly as follow, viz.

1. Whether the judgment of *seizure* against the old corporation, went the length of *dissolving* that corporation.
2. Whether the power reserved by the charter of Charles II. warranted the removal of *all* the officers acting under it.
3. Whether the charter of restoration could operate to revive the *old* constitution.

The court, after twelve months consideration, gave judgment as follows:—

As to the first point, if the *old* corporation were not dissolved by the judgment of seizure, the new charter, creating a distinct body, could not operate; as two corporations, for similar purposes, cannot subsist in the same place at the same time. But the contumacy of the old body, in not appearing to the *quo warranto*, has been said to cause the judgment of seizure to work an extinguishment of their franchises, and therefore the new charter was legally granted.

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As to the second, it is said that the power reserved to the crown in the charter of Charles II. did not warrant the removal of *all* the officers, and therefore did not affect the existence of *that* corporation.

And lastly, it has been determined, that the charter of restitution could not restore the dissolved body, after the acceptance of a new charter, and is therefore null and void.—See *Reports of Trinity term, 1788, the King against Amery.*

It is now highly proper to draw a parallel between the circumstances of Chester, and those of other corporations.

It appears by king James's proclamation, that the places (besides Chester) which had either interlocutory or final judgments against them entered of record, were, the cities of London and York, and the towns of Calne, St. Ives, Poole, Thaxted, Llanghaur, and Malmesbury.

That those whose surrenders of their antient charters were entered of record, were, the cities of Exeter and Winchester, and the towns of Thetford, Nottingham, Bridgewater, Ludlow, Bewdley, Beverley, Tewksbury, Doncaster, Colchester, Launceston, Liskeard, Plympton, Tregony, Plymouth, Dunwich, Fowey, East-Loo, Camelford, West-Loo, Tintegal, Penryn, Truro, Bodmyn, Hadleigh, Lest-withiel, and Saltash.

A third description, comprehending, as there is reason to believe, all the other corporations in the kingdom, were such whose surrenders, or the judgments against them, had *not* been recorded.

The city of *London*, like Chester, had a charter of restitution. But in order to preclude all possibility of the forfeiture of its franchises hereafter, by judgment of law, it was deemed prudent, after the revolution, to establish them by act of parliament; by which act, the judgment given against that city was declared to be *arbitrary and illegal.*

A judgment of seizure, for want of appearance, was entered against the city of *York*, as in the case of Chester—a new charter was granted and accepted—But at the revolution they were permitted to *appear*, and a *noli prosequi* was entered on the record. They have, therefore, since acted upon their antient constitution. But it now appears, that the judgment of seizure having made a legal way for the *new* charter, their subsequent appearance in the character of the *old* corporation, was irregular, and the new charter must be virtually in force at *York* at the present day.

Against the borough of *Llanghaur*, there was a like judgment for want of appearance, and also a final judgment, that the corporation should be *wholly excluded* from their antient franchises. *A fortiori*, therefore, no charter of restoration could operate in that place.

St. Ives is in a situation almost exactly similar.

There was a judgment for the like want of appearance against the corporation of *Calne*, and writs of seizure and *capias ad satisfaciendum* issued against the defendants—consequently the way was clear for the operation of a new charter.

Poole is more nearly still in the same circumstances as Chester. There was a judgment of seizure for want of appearance—afterwards a rule for final judgment, which does not appear to have been recorded. There were also charters of the like import granted and accepted.

Thaxted is nearly in the same situation; no final judgment appearing to have been given.

In the case of *Malmesbury* there was an interlocutory, and also a final judgment, which judgments were reversed *after the revolution*, and the corporation restored by the decision of the house of lords.

With respect to those *twenty-eight* boroughs whose surrenders of their antient liberties were recorded, it is plain, that if a surrender be equal in effect to a judgment of seizure on record, their old constitutions must have been entirely gone, and no charter of restitution could revive them.

It may be supposed that the corporations, whose surrenders, or the judgments against them, *not being reco. ded.* were insufficient to work a forfeiture of their antient liberties, may be secure from the effect of the new charters. But this is by

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no means certain. For it was thought necessary that Liverpool, Shrewsbury, and probably many other places should have charters of restitution, the validity of which is now become extremely doubtful. Besides, in many cases, all the officers created by the new charters might be members of the old corporations, who having accepted, would ever afterwards be bound by them. To this it may be added, that though king James's proclamation affects to remove *all* the officers created or elected under those charters, it has been at this day determined, that he exerted an authority in that instance which was illegal and void.

But supposing *all* the charters of *all* the corporations in this kingdom to be at this moment sound and unaffected, the most obvious inference from the Chester-case, as it now stands, is this—That the crown may at any time, and without alledging any cause, call upon them to shew by what authority they claim to be corporations; and if by any means an appearance can be prevented, a *dissolution* follows immediately. A new charter may then be directed to a few individuals, and if they, with a few more, accept and act under it, that charter is binding upon the whole community, however numerous. (*See Reports of Hilary term, 1787, King against Amery.*) If so, it becomes a most serious and important enquiry, UPON WHAT GROUND OF LAW THE REVOLUTION HAS PUT THE LIBERTIES OF THE BRITISH NATION?

Of the *necessity* of such an enquiry it is presumed no one will doubt who reads the following report of a committee of the house of commons, dated 4th March, 1689:—"Resolved, *nem. con.* That the late prosecutions of quo warrantos against "the cities, two universities, the towns corporate, boroughs, cinque ports and "plantations, and the *judgments* thereon, and the surrender of charters, to the "violation of their ancient rights, are *illegal*, and grievances." With which report the house agreed. A bill, founded on this resolution, was introduced and passed; but was rejected in the house of lords by a majority of eight proxies, probably because it had happened that in a very few instances where specific causes of forfeiture had been proved, such judgments were *in summo jure*, legal.—(*Blackstone, vol. 3, p. 263.*) In the case of Chester, however, no cause of forfeiture was even pretended.

As it does not appear that any question of this important nature has been agitated since the revolution, but it has rather been taken for granted, that what Charles II. did to deprive corporations of their liberties, and to throw them under the power of the crown, was, in general, illegal; and that what his successors have done to restore them, was legal; it seems indispensibly necessary, that this interesting case should be brought under the notice of the legislature, that if any farther security for the freedom of the people be really wanting, it may be adopted. Impressed with this idea, the prosecutor in this cause has determined upon an appeal to the house of lords, where it must undergo such a solemn discussion, by the united wisdom of that august tribunal, as its merits appear well intitled to. In adopting this resolution, he has laid aside considerations of a *private* nature (tho' to an individual in *his* situation, of no small moment) and has attended only to what he thought to be his duty as a Briton, zealous for the honour and happiness of his sovereign, as well as for the liberties of his country.

The assistance hitherto afforded him by his fellow-citizens, tho' in particular instances liberal, has, thro' various causes, been far from adequate to the expence of carrying on such an arduous contest; and as the question now appears to relate not merely to the franchises of the city of Chester, but to embrace a vastly wider circle of interests, he cheerfully submits to the candour and liberality of the friends of constitutional freedom, his claim to general countenance and support.

Chester, October 28, 1788.

R. EDDOWES.

N. B. It seems not improper to remark, that the election of officers for this city, for the year ensuing, have *all* been made exactly conformable to the charter of Charles II. for the first time since the revolution.

[This paper was sent to every member of the house of commons; to every counsel at the bar; and to every corporation in England.]

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No. 38.

Chester, Oct. 31, 1788.

ON Friday last the body corporate of this city assembled at the town-hall, for the election of officers for the ensuing year. A number of citizens and inhabitants gathered around the door, expecting to be admitted to the ceremony, as formerly; but the door was kept shut!—After some time, however, it was opened, and the citizens were permitted to come into the anterior part of the hall, but a number of constables opposed their nearer approach. In this humiliating situation they saw those officers, in whose election they formerly had a voice, chosen according to the charter of Charles II. which vests the appointment in the select body *only*, and deprives the people of every elective franchise as citizens.

These gentlemen are, by the power reserved in the charter under which they were appointed, amovable by the crown at any time, and without any cause of delinquency assigned!—and so we wish them joy of their *uncertain* election!

As the proceedings in the cause between the freemen and the select body are not yet complete, and the intention of the prosecutor to appeal to the house of lords is well known, where was the necessity for this odious innovation?

Let it be remembered, that any persons taking up their freedom, or old freemen *re-sworn* (which, perhaps, in some cases, may be found necessary) are to bind themselves by a solemn oath, to maintain the charter of Charles II. “with all their might and power.” Some persons, indeed, may very properly take this oath, for the charter was originally procured in order to serve a *particular interest*, and is now revived for the self-same laudable purpose; and those that maintain the *charter*, must of course be true to the *interest*.

We do not hear of any preparations for celebrating the *centenary* of the revolution, in this city, nor is it fit that any rejoicing on that account should take place at present, for the citizens are actually at this moment in the same subjugated state, as to their municipal rights, as their ancestors were immediately before that æra. In point of freedom, they are more than a century behind the rest of their countrymen;—all they ought to rejoice at, is, that a mild and merciful king, and not a tyrant, at present fills the throne. But if, through the spirit of a few individuals (who are vigilant for the general weal, and liberties of the city, while many others seem to be sunk into a kind of torpid apathy) freedom should again lift her drooping head—if the most august tribunal of the nation should *reverse* the judgment which has caused a temporary suspension of the antient rights of the citizens—*then* it is hoped that not only the *national* but also a *local* REVOLUTION will claim their joyful and grateful commemoration.

E.

No. 39.

Chester, Nov. 7, 1788.

MR. FLETCHER,

SOME of our good friends, the anti-revolutionists, have of late thought proper to be very *witty*, at the expence of what they term the *squibs* against them and their cause, which have occasionally appeared in your paper; and, amongst other *elegant* similes, they say, “that it is like the barking of a *cur* at a *mastiff*!”—Now, though some ill-natured folks may think, that the expression has more of the *canine* than the *human* sound in it, yet, as a *brother-barker*, I must naturally approve of the metaphor, and say, that it is *equally polite, elegant and just*—save only one trifling mistake—which is no more than the misapplication of the two animals, or rather, chaining the English mastiff on the *wrong* side—for I leave it to every *dog* of *common sense*, whether the friend and supporter of constitutional freedom, as handed down by the glorious principles of the revolution—or its declared and avowed enemy—is more entitled to the appellation of mastiff?—a name to which we necessarily annex the idea of *security of rights*.

* f 2

If,

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If, therefore, any *snarler*, should in future make use of so *liberal* a compliment, he will, it is feared, not only be pronounced a *cur*, but one of the genuine and legitimate sort;—*i. e.* A PURE PUG OF KING CHARLES'S BREED.

Your's, faithfully,

A SETTER.

C.

No. 40.

To the citizens of Chester,

THE house of lords having ordered the corporation-cause to be argued on the 16th inst. I beg leave again to solicit the indulgent attention of my fellow-citizens; and I chuse the present interval for this purpose, because what I wish to offer could not appear with so much propriety after the decision has taken place.

Having through the whole of this important business voluntarily flood forth in the character of assertor of your liberties, I am solicitous that my conduct should *now* appear to have corresponded with that character; and that my *unexpected* perseverance should not be construed into a blind and wilful obstinacy, but believed to be the effect of a firm and rational conviction of the goodness of the cause, aided by the advice of able and honest counsellors.

In the out-set, no man of common sense could entertain a doubt but that the franchises of the citizens of Chester were grossly violated. The charter of Henry VII. was in every person's hands, and was known to contain an express power for the commonalty to elect their aldermen and common-council. At the same time that the select body professed to be governed by this charter in other particulars, they assumed *to themselves* the power of making these elections under the authority of a bye-law, the existence of which was indeed ascertained by a solemn trial and verdict in the year 1733; but its legal efficacy acknowledged to be totally out of the question. To set it aside was considered as a matter of no difficulty; and the conjuring up, by the corporation, of the unthought-of, and long-forgotten, charter of Charles II. could not but excite equal surprize and indignation. Indeed it scarcely appeared probable that they would persist in adhering to this charter, when it was considered, that it was fabricated at the worst of times, and for the worst of purposes; that it threw them entirely into the hands of the crown; and that it was totally set aside (or at least meant so to be) at the revolution. It being, however, evidently their last shift, they met the question upon trial, resting their case entirely upon it.

It cannot be necessary here to repeat what has been already on several occasions explained: it is sufficient to observe, that the merits of the question now depend chiefly upon this point; namely, whether the interlocutory judgment given against the old corporation, in the time of Charles II. had the effect of dissolving it, and making a legal way for the charter which it is now attempted to establish?

It is certain that the universally received and established opinion, before the late judgment of the court of King's-bench, was, that an *interlocutory* judgment *alone* could not effect a dissolution. To prove this, it may not be improper to state what was said, not only by the defendant's counsel (who were interested in maintaining an opposite doctrine) but also what was declared from the bench upon the same subject.

Mr. Bearcroft. "There was a judgment for the crown, which is called the *interlocutory* judgment (the first judgment, and not the final one)—you will find *that* entered of record, and the effect of it is this—that it seizes into the hands of the king, the liberties and franchises of the corporation, until the court shall further order. This is not final, *nor does it operate to the dissolution of the corporation*; it only suspends their effect."

"—— It (*the interlocutory*) is the first judgment upon account of the parties not appearing to enter into any defence—I admit that this does not put an end to, or dissolve, the corporation."

Baron

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Baron Eyre. "They did not appear to defend themselves: the consequence was, that there was a judgment by default against them for not appearing: their franchises were then seized into the king's hands—that certainly did not produce a dissolution."

Mr. Justice Grose. "By the interlocutory judgment the corporate capacity was not forfeited; till the entry of final judgment is made—undoubtedly there is no dissolution."

The judgment of the court, however, was given (upon opposite principles) for the defendants. It now became manifest that not the liberties of the city of Chester alone, were affected by this decision, but those of most of the boroughs in the kingdom. I felt the awfulness of my situation—"If this charter, the principles and provisions of which are totally contrary to those of the revolution, is to prevail in Chester, many other places are in the same predicament: if matters rest here, the revolution itself, as to the security of the liberties of the people, may become nugatory; and not to make the appeal which it is still in my power to make, may be to appear to posterity as the cause of the mischief." Upon examining, accurately, the principles on which the judgment was grounded, it appeared that a very material fact had been mistaken; and those with whom I advised gave it as their unanimous opinion, that, in every view of the case, it ought to go before the house of lords, for final decision.

In that decision (be it what it may) I shall acquiesce with all possible deference. I trust I shall neither be unduly elated with success, nor depressed by disappointment; but preserve that equanimity which should never, in any situation, desert an honest, upright mind. Whether my opponents will yet believe that I have no interested or ambitious views, I know not, nor does it give me any concern. But this I know, that I have long been in possession of a title, to which none of theirs could give any additional lustre; namely, that of an INDEPENDENT ENGLISHMAN. I know also that, as such, I have done my duty to my country, in prosecuting to the utmost a question immediately affecting the principles of the glorious revolution; and I know that I have fulfilled my oath, as a citizen of Chester, in asserting its franchises *with all my might and power*;—the rest I leave to impartial posterity.

The pecuniary burden of this contest has undoubtedly been heavy; but I trust the generosity of my fellow-citizens, and of the public at large, will considerably lighten it. I have some ground for this hope, if there yet remains any value for what every Briton ought to hold most dear and sacred; and I trust I shall not fare the worse, in that I decline, for reasons I have heretofore given, to make any personal application on that score.

In committing the whole of the proceedings in this cause to the press, while I hope to lessen the expence incurred, I flatter myself that I am providing for the more easy discussion of this question in future; if it be not now finally settled. And if, after all, the honour of restoring the citizens of Chester to their franchises be reserved for some one more worthy of it, I can at least enjoy the satisfaction of reflecting, that it will not be forgotten, that *something* has been contributed towards it, by the well-meant and persevering endeavours of such an one as

4th June, 1789.

RALPH EDDOWES.

No. 41.

To the citizens of Chester.

WHILE I offer you my most cordial congratulations on the decision which has reinstated you in the possession of your franchises, I should be sorry to be considered as addressing those only who have favoured me with their countenance and support thro' the course of this long and arduous contest. I cannot persuade myself that any person who bears and values the title of *Englishman*, can regret, that a system of equal and constitutional liberty is to succeed that which (from the times in which it originated, the views with which it was formed, and from the judgment of the most august tribunal in this kingdom) I am warranted in calling—a tyrannical usurpation.

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ation. Had the event, thro' any unfortunate circumstance, been otherwise, I will not believe it possible that any of the citizens of Chester could have exhibited to their country such a spectacle of horror as that of rational beings and Britons exulting in the deprivation of every distinction that can render them truly respectable, and triumphing in the destruction of those liberties they had solemnly sworn to defend.

Interested, then, as ALL are in the blessings of freedom and harmony, why should not ALL unite to secure and preserve them? Fellow-citizens, the happy opportunity now seems to present itself, of extinguishing that bitter spirit of party, which has for more than a century alienated our affections from each other; and which, if it has for a time appeared to subside, has done so *only* in appearance, to break out afresh with redoubled asperity. Exercise the understandings of *men*, and you will readily perceive, that *peace and harmony*, those most invaluable blessings, are to be secured only by placing them on the broad basis of equal freedom. A forced acquiescence in unreasonable claims and ambitious views, is not peace, is not harmony—the spirit of men *will* and *ought* to rise, when an attempt is made to depress it by such ignominious burthens, and will assert, sometimes we see with success, its natural claim to independence. But *then* is the moment for prudence to interpose, and prevent it from overstepping those boundaries which it had been so ready to prescribe to others. That such may be the conduct of my fellow-citizens on the present occasion, is my most sincere and earnest wish; and that such a happy union of interests and views, with respect to civil offices and parliamentary representation, may be adopted, as may afford a well-grounded expectation of continued peace and prosperity. Against any other use of the advantage now obtained, I, for one, will ever set my face; and oppose, with all my might, those whom I now call my friends, if they attempt to transgress that just and equal rule. But if, through a prudent and moderate conduct on both sides, such a desirable arrangement should take place, I shall think all the pains I have taken, and all the time and expence I have bestowed, in this great conflict, amply rewarded—I shall look upon the felicity and unity of my fellow-citizens, not merely with *satisfaction*, but with an honest *pride*, that it has fallen to *my* lot to lay the foundation of such a glorious structure—The present event is undoubtedly an *advantage*—but that would be indeed a TRIUMPH.

Chester, April 24, 1790.

R. EDDOWES.

No. 42.

To W. HALL, Esq.

SIR,

I have been informed that a petition to parliament has been sent up by the gentlemen of the corporation, to procure an act for making elections in contradiction to the charter, and consequently to supersede it. I shall be truly sorry if this step, which upon re-consideration must appear too precipitate, has *really* been taken, as it will, instead of putting an end to our party disputes, only serve to perpetuate and inflame them. Be assured, sir, that there is not, nor ever has been, any design to destroy or disgrace the corporation, but directly the reverse; and if the wishes of both sides could be met by an act of parliament, modifying the charter in some instances, particularly in the election of aldermen, it would be cheerfully consented to. For this purpose give me leave to propose a conference between our counsel, two on each side, in London, who may be empowered to settle the preliminaries of such a desirable accommodation. I beg the favour of being informed whether you think proper to lay this proposal before the gentlemen of the corporation,

And am, sir, your very humble servant,

April 26, 1790

R. EDDOWES.

To

A P P E N D I X.

To Mr. EDDOWES.

SIR,

Tuesday morning, April 27, 1790.

I acknowledge the receipt of your letter, but as I do not see, if the corporation was convened, what they could do upon so general a proposition as yours is, especially as the recorder is absent, I cannot, without his concurrence, advise that the body should be assembled to deliberate upon it. If you should think fit to make any overture to the recorder, tending to heal the disputes, which have so long agitated the city, any recommendation of his, towards an accommodation, would have great weight with the corporation.

I am, sir, your most humble servant,

W. HALL.

[Copies of the two preceding letters were sent to Mr. Bower by Mr. Eddowes, with a request that he would inform Mr. Serjeant Adair whether he had any objection to the proposed conference.]

Extract of a letter to Mr. EDDOWES.

SIR,

—I have before hinted that it would not be possible for me to agree upon terms of accommodation with my friends, who were your counsel. No men upon earth can have more inclination to oblige each other, or entertain a higher regard for each other, than Serjeant Adair and myself, but the opinions of the parties to the present contest, are so diametrically opposite, that there are no means of reconciling them in any degree. The Serjeant and I had a momentary conversation together, and we found we began to differ, fundamentally, almost in the outset. I will, therefore, give you a proof of my not being *personally* your adversary, by telling you, frankly, that I must continue to be such, in my *corporate* character, to the utmost of my power, in resisting every attempt to alter the present constitution of the city; and, if you dare trust the declaration of an avowed enemy, I should almost go so far as to say, our resistance must, finally, be attended with success. I admit you have driven us from the defence we thought fit to rely upon in the last attack, but there are many strong posts yet behind, which it will require much labour to carry, if they are to be carried at all.

I have the honour to be, sir, your very humble servant,

May 25, 1790.

FOSTER BOWER.

To FOSTER BOWER, Esq.

SIR,

I am to acknowledge the honour of your letter of the 25th instant; and while I cannot but regret that its contents are so unfavourable to my wishes, its candor certainly demands my sincere thanks; nor shall I fear giving offence, by freely communicating such remarks as have suggested themselves upon the perusal of it; trusting that you will consider me as addressing you not in your *private*, but your *professional* character, as the advocate and first law-officer of the corporation of Chester, as having spoken *their* sentiments, and acted by *their* authority.

One part of your letter, and one only, seems to carry a little ambiguity with it—I mean that wherein you tell me you must resist, to the utmost of your power, every attempt to alter the PRESENT constitution of the city. What that constitution is, in your idea, I am rather at a loss to know. Taking it for granted that you do not speak of what *ought* to be the constitution under the charter of Henry VII. am I to understand by it the state of affairs at the commencement of the late dispute? I can scarcely think so, because an *attempt*, and that a very desperate one, has actually been made on the part of the corporation, to *alter* it very materially, by introducing an unqualified system of oppression under the charter of Charles II. And if you do not really mean the constitution contained in the provisions of that charter,

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charter, according to which we all know the *present* officers have been elected, I fear that what you determine to adhere to is something so like it, that, if you can support such a resolution, there will be some room to apprehend, lest *law* and *liberty* prove no more than mere empty sounds, without a meaning, and the most solemn decisions of our highest tribunals, impositions upon the common sense and feelings of mankind!

It is, however, sufficiently clear, from the whole tenor of your letter, that my proposals for an amicable, honourable, and liberal accommodation have been ineffectual. At this I will not pretend to say I am either surprized or disappointed. A corporation has been well defined by one of the sages of the law, to be "a body without a soul"—that is—(without any strained construction of the term) a kind of *caput mortuum*—a heap of sluggish, unwieldy matter, possessed of little other power than the *vis inertiae*, or incapacity of being moved; upon which, reason, argument, intreaty, expostulation, are totally thrown away. Having uniformly, through the course of the late contest, found them *dumb*, it is no wonder I now find them *deaf* to every overture of conciliation and friendship: it is no wonder that, judging by their own want of feeling, they should expect to find the citizens dupes enough to fall in with any narrow, oppressive scheme they shall think proper to adopt, and ready to compliment them with the sacrifice of every distinction that makes the name of *citizen* respectable.

However mortified I may be to find the corporation in such an untractable temper, I must candidly confess I do not feel at all alarmed at the *strong* hints you give of the probability of final success to their measures: an instance of the fallibility of *most respectable* opinions is so recent in my memory, that my anxiety on that account is very trifling. And as to the points upon which they may rest their future defence, depend upon, sir, they are all anticipated! Every inch of their ground is at least as well known to us their opponents as to themselves! Of all their "*strong points*" we have the most accurate and correct plans—we are acquainted with all their turnings and windings, and could meet with effect the most ingenious manœuvres of their engineers. You must permit me to make one remark on this subject—I am too well convinced of your integrity as a man, and your ability as a lawyer, to believe that you did not advise your clients in the late cause to chuse the very *strongest* and *best* ground of defence their merits could furnish. "I take it for granted" (if I may presume to adopt the expressions of the Lord Chief Baron) "that having looked into all their charters, and all their bye-laws, and having seen exactly what could be done and where the case pressed, you found yourselves obliged to adopt this unfortunate ground." If then the epithet of "unfortunate" proves to have been rightly applied to the *best* defence your clients could set up, shall we be persuaded to look upon those of *secondary* consideration as absolutely impregnable? Or if, by way of palliating the *misfortune*, you should tell us that, among others of *equal* strength, this happened first to present itself, we will not differ with you about that, but readily admit that *it may be so*.

In one respect I grant the corporation are formidable—they are *in possession* of power, and if they are resolved *per fas aut nefas* to keep it, there may be occasion for a fresh litigation between them and *some one person* on behalf of the freemen. Who that person is to be, I cannot pretend to say; or whether he would meet with the proper *necessary* support I cannot ascertain—As to the part I have taken in the late cause, tho' a principle of honour and love to my country determined me not to abandon, after having once undertaken it, yet prudential reasons absolutely forbid me to place myself *again* in such a situation. The corporation may resemble the head of *Hydra*, or the stable of *Augeas*, but I am no *Hercules*, nor do I find myself disposed to undertake the *labour* of delivering the public from all its baneful and loathsome effects any more than that which you seem to think it would require to dispossess them of "*the many strong points yet behind*" (an idea which supposes a succession of defeats) in which their distress might compel them to entrench themselves. Of such an undertaking, however, I am ready to think, the *labour* would constitute

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constitute the chief difficulty: For tho' I, after an honourable and successful campaign, deem it prudent to retire from the service, yet I leave to my successor, if haply one shall be wanted, *veteran troops*, steady, experienced, well disciplined, and eager for a fresh engagement—*artillery*, ready mounted, and properly arranged—nothing would be wanting but *ammunition*; a moderate quantity of which, now that the *principal* fortress is demolished, would be sufficient to insure success.

I think it, nevertheless, far from impossible, or even improbable, that a different mode of proceeding may prove equally effectual. If I am not greatly mistaken, the corporation will find it very difficult, if not impracticable, to regain the footing they formerly held in the opinion of the citizens at large. In how high a tone soever they may think proper to *talk*, they will always be looked upon as a *vanquished* and *vanquishable* body; and the consciousness of having no firm ground under them, will render all their steps timid, tottering, and irresolute. Till the late legal investigation, many important parts of the history of the city had been either buried in obscurity, or in the lapse of years totally forgotten. Of these the public now are, or soon will be, in complete possession; they will naturally exercise their judgment as to the honour or discredit the facts thus disclosed may reflect upon the *predecessors* of the corporation; and there is no injustice in remembering the sins of the *fathers* against the *children*, if the *children* tread in their steps. But were it otherwise, I think the select body of the present day have done enough to incur the severest reproaches of every independent man, who reveres the constitution of his country. Nay, I find myself compelled to add, that their recent determination, not to admit the citizens to the exercise of their franchises, is an affront at which every man of spirit should take fire!—Are our liberties, then, to depend upon the pleasure, or rather the caprice, of the *corporation*? Who are *they*, that, in spite of the plain, literal sense of charters—that, in defiance of the most solemn legal decisions—*they* should take upon them to prescribe what those liberties shall be?—or that our enjoyment of them shall be just so much (and no more) as will suit *their* particular views and purposes? This arrogance, I trust, will meet with its due chastisement: There *are* times when the voice of the citizens *must* be heard—I am confident there is among them an *independent* interest, which, if thrown into *one scale*, would make that of the corporation, and those whose cause they espouse, to *kick the beam*; and if there *be* such a thing as public virtue remaining among us, I hope they will, ere long, be taught, that the rights of Englishmen are things too sacred to be trampled upon in such an indecent manner!

I find it high time to conclude. Forgive me, Sir, if, with such an idea rising in my mind, I perceive myself in danger of overstepping that line of equal temper and moderate conduct which I have ever laid down for my direction in this dispute. I beg leave to repeat, that I mean nothing personal, and to assure you that I am, with all possible respect for you in every character, but *one*,

Your most obedient servant,

R. EDDOWES,

May 29, 1790.

A P P E N D I X.

No. 43.

CHARTER OF HENRY VII.

(A NEW TRANSLATION.)

Charter of Henry
VII. 6^o. April.
Anno Regni 21^o.

The grant of the
city and liberties.

The city and com-
monalty to choose
yearly 24 aldermen.
And
40 common-council.

Recorder, how
chosen.

HENRY, by the grace of God, King of England and France, and Lord of Ireland, to all archbishops, bishops, abbots, priors, dukes, earls, barons, justices, sheriffs, bailiffs, and all his faithful subjects, *greeting. Know ye that We*, for the great affection which we have, and bear to our city of Chester, the citizens and commonalty of the same city, and, in consideration of the good behaviour, and great costs and expences of the inhabitants of the same city, as also the voluntary service, many ways rendered by them, against our adversaries and rebels, willing the better estate of the same city, and, especially to provide for the convenience and quiet of the said citizens, their heirs and successors, of our especial grace, certain knowledge, and mere motion, have given and granted, and *do give and grant*, and, by these presents have confirmed for us, and our heirs, to the aforesaid citizens and commonalty, their heirs and successors, for ever, that the said city, and all the ground within the ditch of the said city, with the suburbs and hamlets within the precinct and compass of the same, and all the ground in the precinct and compass of the said city of Chester, and the aforesaid suburbs and hamlets (wholly excepting our castle, within the walls of the said city) be exempted and separated, and in all things, and to all intents, be exempted and separated, as well by land as by water, from our shire of Chester; and, that the said city, and the suburbs and hamlets of the same, and all the ground within the precinct and compass of them (except as before excepted) be henceforth a county by and in itself, distinct and separate from our county of Chester, and that from henceforth it shall be called and named the county of the city of Chester. “* We will also, and give and grant for us, our heirs and successors, to the above-named *citizens and commonalty*, their heirs and successors, that they and their successors, for ever, have power to *elect, make, and CREATE, every several successive year, twenty four fellow-citizens, of the city aforesaid, for the aldermen; as also forty other citizens of the said city, for the common-council,*” of the said city; Which twenty-four citizens, *so chosen and CREATED*, shall for ever henceforth have and bear the name of aldermen of the city of Chester; out of which twenty-four aldermen, one, by the *unanimous* consent and assent of the mayor, aldermen, sheriffs, and the other citizens of the common-council aforesaid, shall be chosen and appointed recorder of the city aforesaid. We will also and grant, for us and our heirs, that the aforesaid citizens and commonalty, their heirs and successors, shall have, make, and have power to choose, from among themselves, *every several successive year,†* for ever, a mayor of the said city; and, that every mayor of the said city, for the time being, so soon as he shall be chosen and appointed

* *Volumus etiam, damus et concedimus pro nobis et heredibus nostris prefatis Civibus et Communitati, heredibus et successoribus suis, quod ipsi et successores sui imperpetuum, singulis annis successivis, viginti quatuor concives civitatis prefate in Aldermannos, necnon quadraginti alios concives ejusdem civitatis pro communi consilio civitatis illius, eligere, facere et CREARE possint; qui quidem viginti quatuor concives sic electi et CREATI, nomen Aldermannorum civitatis Cestrie habeant et gerant imperpetuum.*

† It is observable, that the annual choice of aldermen, &c. and that of mayor, sheriffs, &c. are given in the same terms, “*singulis annis successivis.*”

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pointed mayor of the city, be our escheator and clerk of our market there, and that the said mayor and commonalty, their heirs and successors, for ever, be one community, by themselves, and by the name of the mayor and citizens of the city of Chester, be termed and called, for ever, and by the same name be persons able and capable in law, and by the same name, before us, our heirs, and successors, the earls of Chester, and before every one of our justices, in any of our courts, may plead and be impleaded, answer and be answered; and, that the said mayor and citizens have, make, and have power to choose, from among themselves, *every several successive year*, two citizens, for sheriffs of the said city of Chester; which mayor and sheriffs shall be made and chosen in form following, viz. All fellow-citizens of the said city, suburbs, and hamlets, *dwelling within* the said city, suburbs, and hamlets, of the said city, who choose to be present at the election of the mayor, every year, upon Friday next after the Feast of St. Dennis, may meet together, freely and without hindrance, at the Common-hall of the said city, who, there being so met, or the greater part of them, shall name two citizens, *dwelling in the said city*, that are most sufficient, discreet, and best able (of the number of the 24 aldermen) in the said city, suburbs, and villages, to be chosen in form following:—Either of them may or may not, heretofore, have been mayor or sheriff of that city, and shall in no wise have occupied the office of sheriff, for the space of three years, next preceding the Friday after the Feast of St. Dennis aforesaid; of which two, so named, the greater part of the aforesaid aldermen and sheriffs, then and there present, by scrutiny, shall name, choose, and appoint, one mayor; and, if it so fall out, that in the election or nomination of this one person, for mayor, the discordant voices be in number equal, then we will, that the voice of the mayor for the time being shall be taken and accounted for two: but in the choosing of the sheriffs of the city, this form shall be observed, viz. That the mayor, sheriffs, aldermen, and other citizens of the said city and county, *dwelling there*, if they chuse to be present at the election of such sheriffs, may, without contradiction, upon Friday next after the Feast of St. Dennis, yearly, assemble and meet together; where the mayor, sheriffs, and aldermen, for the time being, or the greater part of them, then and there personally being, shall, the same day, freely choose an able and sufficient person, for one sheriff of the city; and the other said fellow-citizens, then and there present, or the great part of them, one other able and sufficient person, for the other sheriff of the said city; which two, so chosen sheriffs of the said county and city, shall, from the aforesaid Friday next after the Feast of St. Dennis, for one whole year, be and remain. And, that the aforesaid mayor and escheator, clerk of the market, and sheriffs of the aforesaid city, for the time being, shall, immediately after their election, in each year, take the oath, before the mayor for the year preceding, and before the commonalty of the city, in manner and form as heretofore they have been accustomed; and this power we have given them, without the issuing of any writ from the chancellor, or exchequer of us, our heirs, or successors, or waiting for any other mandate from us, our heirs, and successors.

And, that the said mayor of the city aforesaid, both shall and may, do, have, and perform, all things that belong to escheator, and to the office thereof, and to the clerk of the market, and to his office, as well in our presence as otherwise; also the aforesaid sheriffs shall do, have, and perform, all things belonging to the sheriffs, and the

Mayor is escheator and clerk of the market.

Two sheriffs yearly.

The manner of choosing mayor.

Choosing sheriffs.

Mayor, sheriffs, and aldermen, to choose one,

And The rest of the citizens choose the other.

Mayor and sheriffs to take an oath.

Authority of the escheator, clerk of the markets and sheriffs.

A P P E N D I X.

None other to enter
the city.

Sheriff's county
court.

Weekly court.

Mayor to have a
sword carried before
him.

Serjeants to have gilt
maces.

Two coroners to be
chosen yearly by the
mayor.

Their oath and au-
thority.

office of sheriffs, and that every of them may, and shall have power in as ample manner and form, to do all that pertaineth to them, as other escheators, clerks of markets, and sheriffs of other counties or cities in our realm of England, according to the law and custom of the same, do perform, accomplish, and discharge, and ought, and are wont, to perform, accomplish, and discharge. And that no other escheator, or sheriff of our county of Chester, or clerk of market, or any other officer of us, our heirs, or successors, for the time being, enter, or presume to enter, the city aforesaid, the suburbs, hamlets, precinct, and compass thereof, or within the city, suburbs, hamlets, precinct, and compass thereof, in any manner intrude, or presume to intrude, into the exercise of any office there; and that the said escheator, clerk of the market, and sheriffs, of the city of Chester, and any of them, have the same power, jurisdiction, and liberty, or whatsoever else belongs to the office of escheator, clerk of markets, and sheriffs, in the aforesaid city, suburbs, and hamlets, and in the precinct and hamlets thereof, which other escheators, clerks of markets, and sheriffs of us, our heirs, and successors, elsewhere, within our realm of England, and our county palatine of Chester, have or shall have; and that the aforesaid sheriffs of the city of Chester, hold their county courts, upon Monday, from month to month, in like manner as other sheriffs of us or our heirs, in other counties of our realm do or shall hold theirs, and the aforesaid sheriffs of the city of Chester, and their successors, for ever, shall, in like manner, keep their courts there, viz. Every week, on Tuesday, Thursday, and Friday, that they may determine all pleas and assizes, by complaints (without our writ) coming before them, concerning all contracts and cases arising within the city aforesaid, and the limits thereof, in manner and form as in time past they have been accustomed; and that they receive, to their own use, and have all fines, amercements, and other perquisites, at all times hereafter, and that they exercise all offices, liberties, and franchises, as any other sheriffs of the said city, in time past have accustomed to do, have, exercise, hold, and receive. And, moreover, we have granted, and by this our charter have confirmed, for us and our heirs, to the aforesaid mayor and citizens, and to their heirs and successors, for ever, that the mayor of the said city of Chester, and his successors, for the time being, have their sword, which we gave them, or any other, as may please them (in the absence of us or our heirs) carried before them, with the point upright, as well in the presence of other the nobles, and lords of our realm of England. And that the serjeants at mace of the mayor and sheriffs of the city aforesaid, and their successors, for the time being, may bear their maces gilt, or of silver, or silvered, and adorned with the escutcheon of the arms of us and of our heirs, as well in the presence of us and our heirs, as in the presence of our consort, our mother, and our heirs and successors aforesaid, within the said city, suburbs, hamlets, lands, precincts, and compass aforesaid, as do our own serjeants at arms; lawfully, without controul, and at their pleasure, without lett or hindrance of us or our heirs hereafter. And further, we grant to the said mayor of the city aforesaid, and his successors, that every year they may choose, of the most honest and discreet citizens of the city aforesaid, two to be coroners of us, our heirs, and successors, within the said city, the liberties and limits thereof; who, before the mayor and aldermen of the city aforesaid, shall yearly take a corporal oath, that they, for the whole year, the duty of coroners shall well and faithfully do and observe, within the city, limits, and bounds aforesaid.

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aforesaid; and, that the same coroners, so chosen and sworn, have power and authority, the same as our coroners in the county palatine of Chester, or any other county of our realm of England, have, use, or exercise. And, moreover, we have given and granted to the aforesaid mayor and citizens, and their successors, that they, every year, elect two of the citizens aforesaid, to be overseers of the walls of the aforesaid city, called muragers, as of old they have been accustomed to do, and that they, every year, oversee and repair the walls of the city aforesaid; and that they, thus chosen, every year, collect and receive a certain custom or subsidy, in the aforesaid city, commonly called murage, towards the maintenance and building of the aforesaid walls, as of old it hath been levied in the said city. And, furthermore, we have granted, and, by this our charter, have confirmed, for us and our heirs, to the aforesaid citizens and commonalty, their heirs and successors, for ever, that the stewards and marshalls of our household, or of our heirs, or the clerk of the market of our household, or of our heirs, from henceforth, neither in the presence, nor in the absence of us, or our heirs, shall enter or sit within the liberties of the city aforesaid, the suburbs, hamlets, lands, precinct, and circuit thereof, or do or exercise their office there, or upon any persons within the liberties of the city aforesaid, the suburbs, hamlets, lands, precinct, and circuit thereof, or under any pretence make, or cause to be made, any inquiry, nor in any wise intrude there, nor commence actions against any of the citizens of the city aforesaid, or any persons residing within the same, *out of* the city, for any matter, cause, or chance, arising, or to arise within the liberties of the city, suburbs, hamlets, lands, precinct, and circuit thereof. And, moreover, we have granted, for us and our heirs, and, by this charter, confirmed to the aforesaid citizens, that if, peradventure, any customs and ordinances, heretofore obtaining and used within the said city of Chester, be, in any part of them, *difficult or defective*, so that on any new emergence arising in the said city, when a proper remedy doth not clearly exist, they need to be corrected, then the mayor, aldermen, and sheriffs, of the city aforesaid, or the greater part of them, for the time being, shall have full power and authority, for the common good of the citizens of our city of Chester, and other our faithful subjects, frequenting the same, by the common assent of the above-mentioned, and by the advice of the mayor, sheriffs, and *forty other fellow-citizens, yearly chosen*, in the manner before directed, for the common-council of the city aforesaid, or the greater part of them, to apply and ordain some new remedy, agreeable to good faith and reason; and that they may require due obedience to these their ordinances, as often and as far as there shall be need, and as to them may seem expedient, so that, however, these ordinances be profitable to us and our people, *and agreeable to good faith and reason*, as aforesaid.

Two Muragers to be yearly chosen.

No officers of the King's household or intermeddle in the city.

Power to make by-laws.

We have granted also, and, by this our charter, confirmed, for us and our heirs, to the aforesaid mayor, sheriffs, citizens, and their successors, for ever, that the same mayor, sheriffs, citizens, and commonalty, have cognizance of all and all manner of pleas, real, personal, and mixt, as also of assizes, novel-disseizin, death of ancestors, certificates, attainments, or else whatsoever, as also of lands and tenements being within the said city suburbs, hamlets, and precinct, and of debt, accompt, trespass, covenant, and other contracts, matters, and cases whatsoever, within the said city of Chester, the suburbs, and hamlets, as also the circuit and precinct of the same (our Castle and our liberty, within the boundary, commonly called the Glover-stone,

Cognizance of pleas.

Except Castle and Gloverstone.

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stone, only excepted) however arising, as well in the presence of us and our heirs, as in the absence of us, and the same our heirs, both before our justices of either bench, justices appointed to hold assizes, and justices itinerant, and before all other justices and officers of us, our heirs, and successors, to hold such assizes, before the mayor and sheriffs of the said city of Chester, for the time being, in the Common hall of the city of Chester aforesaid, with all profits of such pleas, howsoever arising, without lett, hindrance, or impediment of us or our heirs, justices, barons of our Exchequer, stewards, or marshalls of the household of us or our heirs, or of escheators, sheriffs, or bailiffs, or officers of us or our heirs whatsoever; so that the said justices, barons of the Exchequer, stewards, and marshalls, escheators, sheriffs, bailiffs, or other our aforesaid officers, do in no wise intermeddle with the cognizance of such like pleas, arising within the city of Chester, suburbs, hamlets, and precincts aforesaid; or that any of them presume to take any office upon him there, except only the stewards and marshalls of the household of us and our heirs, concerning trespasses, covenants, attainments, contracts, debts, or actions personal, in the household of us or our heirs, done between those which either are or shall be of the same household. We grant, moreover, to the same mayor and citizens of our city aforesaid, to their successors and heirs, for ever, that they may hold all pleas, plaints, and assizes, as well of lands and tenements, within the said city, hamlets, and precinct thereof, as of all trespasses, debts, accompts, covenants, contracts, and demands, within the said city, suburbs, hamlets, and precinct, arising and proceeding by plaints (without our writ) before the mayor and sheriffs of the city aforesaid, and their successors, for ever. And that no citizens of the city aforesaid, nor their heirs, or successors, nor any of them, be impleaded or sued, before us, our heirs, or successors, or before any justices of us, our heirs, or successors, concerning any lands, tenements, or any other contracts, covenants, trespasses, debts, or demands, arising or happening within the said city, suburbs, and hamlets of the same, but only before the mayor and sheriffs of the city aforesaid, and their successors: and, furthermore, We grant to the said mayor and sheriffs, and their successors, for ever, that they, and their successors, for ever, by their serjeants at mace, or any of them, and their successors, may attach and arrest the bodies of defaulting persons, if any such person be impleaded before the mayor and sheriffs, or their successors, hereafter, by any one or more, concerning any covenant, contract, demand, trespass, deceit, accompt, debt, detention, or any other matter or cause, arising or happening within the said city, suburbs, and hamlets thereof; and shall commit him or them to their common jail, there to be kept until they have found sufficient sureties to answer, before the said mayor and sheriffs, or their successors, as to the aforesaid pleas, in manner and form as in the city of London, or in the said city hath been of old time used and approved. And that they have a proper jail and prison, within the said city, in a certain place called the Northgate Tower, in the same manner as in time past they have had and used, to correct and keep all prisoners and transgressors, according to their deserts. And that they hold their court, called the Portmote and Crownmote, to be holden before the mayor of the city aforesaid, for the time being, in manner and form as formerly they have been accustomed. We have granted, moreover, for us and our heirs, to the aforesaid mayor and citizens, their heirs, and successors, that they be not summoned, placed, or impannelled, and that none of them

No citizens to be impleaded out of the city.

Arrest by serjeants.

Northgate jail.

Portmote & Crownmote courts.

Citizens not to be on juries out of the city, except it concern the King.

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them be summoned, placed, or impannelled, in assizes, attaints, juries, or inquisition of tenures in-ward, or any other deed, contract, slander, or complaint, or any other action personal, real, or mixt, in the said city of Chester, suburbs, hamlets, grounds, and precinct aforesaid, howsoever arising; nor make any recognizance in assizes, attaints, or juries, without the said city, unless the fact do specially concern us or our heirs. We have granted, moreover, for us and our heirs, to the aforesaid citizens, their heirs, and successors, that they have all chattels of outlaws, felons, fugitives, howsoever attainted or condemned; and of self-murderers and deodands, and of all that are executed for felony; as also of petty traitors, contingent within the said city of Chester, the suburbs, hamlets, grounds, precinct, and compass aforesaid. And that the aforesaid citizens, their heirs, and successors, for ever, be quit, and altogether disburthened, of all and all manner of customs, prises, and all other payments, exactions, and demands, for all their merchandizes there (only excepting the customs of prize wine and iron) to help and ease the payment of their fee-farm of the said city of Chester. And that the said mayor, sheriffs, and citizens, of the city aforesaid, their heirs, and successors, for ever, have the forfeit of victuals, by law howsoever forfeited, to wit, bread, wine, and all other saleable things, which belong not to merchandize. We have granted, moreover, to the said citizens and their successors, for us and for our heirs, that the said mayor or sheriffs, their heirs, and successors, shall, at all times hereafter, have the searching of the water of Dee, from a certain place called the Iron-bridge, to another place called Arnold Sherre, to search and oversee all nets, weares, and other devices for the taking of fish, set in the same water, and, if they happen to find, either by examination or by inquiry, that any persons, against the form of any statutes or ordinances, have used them, to the destruction of young fish, called Frey, that then they may take, carry away, and detain, and, at their pleasure, burn, all such instruments, for their punishment who had there set such nets, weares, or devices, or who hereafter shall presume to set or erect them, and to bring to justice, mulct, fine, or otherwise punish, according to the law, ordinances, and customs, of the city aforesaid, all and every of them which do so set their nets, weares, and engines, as the ordinances aforesaid, either enacted already, or hereafter to be enacted, shall require; and that they have all fines, amerciaments, and forfeits, for the aforesaid transgressions, howsoever assessed, and, by themselves, their sheriffs, or officers, to be collected and required. We will also, and grant, and, under a heavy penalty, forbid any man to make any trenches in the said water of Dee, within the marks, limits, and bound aforesaid, or that he presume to carry, or cause to be carried, any dung or other filth, in boats or other vessels, through the aforesaid water, under pain of forfeiting the boats or vessels, and a fine, according to the discretion of the mayor and sheriffs of the city aforesaid; which forfeits and fines we will that the citizens of the city aforesaid, and their successors, have and receive in ease and aid of the farm of the city aforesaid. We have granted also, for us and our heirs, to the aforesaid mayor, sheriffs, citizens, and commonalty, their heirs, and successors, that henceforth no merchants, within the city aforesaid, in the suburbs, hamlets, precinct, and circuit aforesaid, sell, by wholesale or retail, fish or flesh, except in the accustomed place assigned by the aforesaid mayor, sheriffs, citizens, and commonalty, under pain of forfeiting the said fish or flesh, and paying a fine, at the discretion of the mayor and

Goods of felons and fugitives, &c.

Citizens freed from all customs, except wine and iron.

To have forfeit of victuals.

Fishing in the River Dee.

Trenches therein.

Markets.

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Justices of peace
within aldermen.

and sheriffs, of the city aforesaid, for the time being; which forfeit and fine, we will, shall be converted and applied to the use of the citizens of the city aforesaid, in aid of payment of their fee farm aforesaid. We will, moreover, and of our abundant grace, and for us, and for our heirs, for ever, so much as in us lieth, give and grant to the now citizens, and their successors, that the mayor and recorder of the city aforesaid, now being, and their successors the mayors and recorders of the said city, for ever, and those aldermen, who have been mayors of the said city, as also those who hereafter shall sustain that burden, shall, *so long as they shall be aldermen there,** by these presents, jointly and severally, be keepers of the peace of us and our heirs, within and through the whole city of Chester, the suburbs, hamlets, lands, precinct, and circuit, of the same city; as also justices of the peace of us and our heirs; and also that they keep, or cause to be kept, without any other commission to be given them than these letters patent, all statutes, ordinances, and provisions, for the keeping of the peace, and concerning foresters, labourers, craftsmen, servants, hostlers, beggars, and vagabonds, giving out marks of association, or of cloth and caps, neither to be given nor used, of lollardy, of counterfeiting, clipping, washing, and howsoever falsifying of our coin, and of all other articles published, or to be published, and to be kept and executed by justices of the peace, as well within and through the whole city aforesaid, as the liberties, suburbs, hamlets, grounds, precinct, and circuit aforesaid, according to all the force, form, and effect, of the same statutes, ordinances, and provisions; and that they cause all those whom they find offending against the form and effect of those statutes, laws, ordinances, and provisions, to be punished as those laws shall require; and that they bring to justice the bodies of all those, according to the laws and customs of our realm of England, who have threatened any of our people, concerning their bodies, or the burning of their houses, and compel them to find sufficient security for peace and good demeanour towards us and our people. We will also and grant, that the same justices, or four of them (of whom the mayor and recorder, for the time being, shall be two) be also justices of us and our heirs, to inquire, by oath of honest and lawful men, as well of the city aforesaid as of the liberties, suburbs, hamlets, lands, precinct, and circuit thereof, by whom the truth of the matter may be better understood, from time to time, as often and whensoever they shall think good, concerning all felonies, trespasses, forestallings, and regratings, from time to time, there done and committed; of all manner of assemblings against the peace, and to the disquiet of our people, of all persons passing on foot or on horseback, with armed force, of lyers in wait, to entrap or destroy the people; of all that wear caps there, and other liveries, of any sort, on consideration and maintenance, contrary to the form of ordinances, laws, and provisions, in that behalf made; of hostlers, and others, who shall offend in the abuse of measures and weights, or in the sale of victuals; and of those who shall harbour any labourers, craftsmen, servants, hostlers, beggars, and vagabonds and others, contrary to the form of the ordinances, statutes and provisions, in that behalf made, both within the whole city, liberty, suburbs, hamlets, ground, precinct, and compass aforesaid; and of all and every other article and articles which shall be inquired of before any justices of peace, in any other shire of our realm of England,

* *Quamdiu Aldermanni ibidem steterint.*

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land, from time to time, and there done and committed; and the full truth of all other articles, howsoever concerning the premises, or any of them. We have granted also to the aforesaid citizens, their heirs, and successors, that they choose, and have power to choose, as often as they think good so to do, such undersheriffs, clerks, and sheriffs' bailiffs of the city aforesaid, and the county of the same, and in the suburbs and hamlets thereof, as they will answer for, to have, exercise, and enjoy, those offices, as long as it shall please them, as freely as, at this time, is done in our city of London, any statutes or ordinances to the contrary made notwithstanding.

Sheriff's under officers.

Wherefore we will, grant, and assuredly command, for us and our heirs, so much as in us lieth, that the aforesaid citizens and their successors, for ever, enjoy and use all the aforesaid grants, in manner and form above expressed: notwithstanding it is not our mind or intent, that, under pretence by virtue of any grant or ratification, by us or our progenitors, to the county of Chester, as is before-mentioned, the same citizens or their successors, be any way restrained of any of their privileges or antient customs of the same city; but that they the citizens of our city of Chester aforesaid, their heirs, and successors, keep all their liberties and free customs, perfect and inviolate, as any time heretofore they have done. And moreover, of our abundant grace, We have granted, and by this our present charter confirmed, to the aforesaid present mayor, citizens, aldermen, and sheriffs, of the city aforesaid, as also to the citizens and commonalty of the same city, their heirs, and successors, that they, their heirs, and successors aforesaid, from this time, have and hold for ever our aforesaid city of Chester, the hamlets and suburbs of the same, with all lands, tenements, profits, commodities, escheats, forfeits, deodands, amerciaments, fines, and a certain custom called murage, with all other rights and things aforesaid, howsoever belonging or appertaining to the said city, suburbs, hamlets, and grounds thereof, due to us and our heirs, the earls of Chester, and our successors, in the same manner and form as we, by right, ought to enjoy and possess them, as fee farm of us, our heirs, and successors, the earls of Chester, paying, therefore, to us, our heirs, and successors, the aforesaid earls of Chester, yearly, at our exchequer of Chester, for the tenure of the premises, twenty pounds of silver, and no more, at the Feast of Easter, and St. Michael the archangel, by equal portions; saving that the same mayor, aldermen, and sheriffs, as also the citizens and commonalty of our aforesaid city of Chester, their heirs, and successors, be not hereafter charged with any antient farm of that city, or any arrears thereof, but from the said antient farm, and all arrears thereof, if there be any, and every parcel thereof, be for ever quit, discharged, and dismissed, without composition; or any thing else to us rendered, paid, or done. We grant, moreover, to the aforesaid mayor, citizens, and their successors, that they may build all the void places, within the liberties aforesaid, and make the most of the same, and reap the benefit thereof, and that they receive and take the revenues thereof for the payment of their farm aforesaid. And that they have, for themselves and their heirs, for ever, soke, sacke, toll, and theam, infangthefe and utfangthefe, and be discharged throughout all the lands and territories of us, our heirs, and successors, as earls of Chester, of toll, passage, lastage, murage, pannage, pontage, and tallage, lene and danegeld, gaywyn, and all other customs, as well in England as in other the lands of us and our heirs aforesaid; express mention of the true value of the premises, or of

Confirmation of customs.

Tenure of the city.

In fee farm toll yearly.

Toll, custom.

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any parcel of them, or any act, ordinance, or other thing, matter, or cause, in any wise notwithstanding. *In witness* whereof we have caused these our letters to be made patent, *witness* ourself at *Chester*, the sixth day of April, the twenty-first year of our reign.

No. 44.

CHARTER OF RESTITUTION.

Judgments pardoned

Liberties restored.

Mayor and citizens
reincorporated.

THE King, &c. to all to whom, &c. greeting. *Know ye*, that we, in consideration of the good services which the mayor and citizens of our city of *Chester* have rendered us, as also to promote the good government of the said city, of our especial grace and of our certain knowledge and mere motion, have pardoned, remitted, released, and quitted claim, and by these presents, for us, our heirs, and successors, do wholly pardon, remit, release, and quit claim, to the mayor and citizens of our city of *Chester*, the judgments given against the mayor and citizens of the city of *Chester*, or against the aforesaid citizens, by the name of the mayor and citizens of the city of *Chester*, or by any other name or names, in Hilary term, in the 35th and 36th year of the reign of our most dear brother Charles II. upon an information in the nature of a quo warranto theretofore exhibited by Sir Robert Sawyer, knight, attorney-general of our said brother, in the court of our said brother the late King, before the King himself, held at Westminster, against the mayor and citizens of the city of *Chester*, and also all seizures and process thereupon had; and all and singular forfeitures, pains, and penalties, by the said citizens, or by the mayor and citizens of the city of *Chester* aforesaid, by reason of the said judgments forfeited, had, and incurred; also all and singular, claims and demands of us, our heirs, and successors, against any liberties, privileges, or franchises, by the said citizens, or by the said mayor and citizens of the city of *Chester*, before the time or times of rendering the said judgments lawfully held or enjoyed. We also, by these presents, for us, our heirs, and successors, do wholly remit, release, and quit claim, to the aforesaid mayor and citizens of the said city of *Chester*, the aforesaid information, and all and all manner of process, judgment, and seizure, thereupon had and rendered. And farther, of our especial grace, and of our certain knowledge and mere motion, we have restored and granted, and by these presents for us, our heirs, and successors, do restore and grant to them, the mayor and citizens of the city of *Chester* aforesaid, all and singular liberties, franchises, lands, tenements, rents, jurisdictions, hereditaments, statutes, goods, chattles, interests, reversions, profits, offices, rights, emoluments, customs, acquittances, privileges, easements, benefits, and advantages whatsoever, which the said citizens, or the mayor and citizens of the city of *Chester* aforesaid, had, or of right could or ought to have, or which to them in any wise appertained, at or before the time or times of rendering the said judgments, by the name or in right of the citizens of the said city, or by whatever other name of incorporation the said citizens have been called, in as ample manner and form, to all intents and purposes, as if the information aforesaid had never been exhibited, and the judgments aforesaid, or any process upon the aforesaid information had not been rendered or had. And that the mayor and citizens of the said city of *Chester* be and shall be one body corporate and politic,

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tic, in deed, fact, and name, by the name of mayor and citizens of the city of Chester, and also by all and singular other name or names, such as they lawfully had and claimed at the time or times of rendering the said judgments, or before. And furthermore, we will, and by these presents, for us, our heirs, and successors, grant and restore to the mayor and citizens aforesaid, and likewise to the mayor, recorder, aldermen, sheriffs, and citizens, being of the common-council, and to the assemblies of the said city, being of the several companies or crafts of the said city; and also to all freemen, officers, and ministers whomsoever, of the said city, or within the same, or belonging to the said city, and each of them respectively, who were in the same several offices and places respectively at the time or times of rendering the judgments aforesaid, the several offices, places, and privileges aforesaid, which, at the time or times of rendering the aforesaid judgments, they had or held, with all and singular matters to the same places and offices respectively belonging and appertaining. And we will and command, that all and every the officers, the mayor, recorder, aldermen, sheriffs, and citizens, being of the common-council of the city aforesaid, and all officers and ministers whatsoever, and each of them, who were in the same offices or places at the time or times of rendering the aforesaid judgments, that they and each of them take upon them and execute the same offices and places respectively, in the same manner as they and each of them were held and exercised before the rendering of the aforesaid judgments. And further, we do, for us, our heirs, and successors, by these presents, constitute and restore to William Streete, esquire (who was mayor of the city of Chester aforesaid, at the time of rendering the aforesaid judgment in Hillary term, in the 35th and 36th year of the reign of the said late King Charles II.) the office of mayor of the city aforesaid. Also we constitute and restore to Sir William Williams, knight and baronet, our solicitor-general (who was recorder and alderman of the said city at the like time of rendering the said judgment) the office and place, and offices and places, of recorder and alderman of the same city. And we constitute and restore to William Earl of Derby, Thomas Earl Rivers, Sir Thomas Grosvenor, bart. Sir Peter Pindar, bart. Roger Whitley, esq. the said William Streete, Thomas Wilcocks, Richard Wright, Thomas Sympson, Henry Lloyd, William Ince, John Anderson, George Mainwaring, Peter Edwards, Nathaniel Williamson, William Wilson, Edward Oulton, and Hugh Starkey, gentlemen (who were aldermen of the said city at the like time of rendering the said judgment) the same several and respective offices of aldermen. And we constitute and restore to Robert Morren (who was sheriff of the said city at the like time of rendering the said judgment) the office of sheriff of the said city, to hold and exercise the same several respective offices and places, in such and as ample manner and form as they held the same offices and places respectively before the rendering of the said judgment. And we authorize, command, and require, them and each of them, to take upon them, exercise, and fulfil, the said several offices and places of mayor, recorder, aldermen, and sheriffs respectively, in such and as ample manner and form as they held and exercised the same at or before the time of rendering the said judgment. And that the said mayor, recorder, aldermen, and sheriffs, and the common-council of the city aforesaid, shall choose and cause to be chosen, others in the places of aldermen, sheriffs, and citizens, of the common-council aforesaid, now vacant within the said city, in such and the like manner

Officers, freemen,
&c. replaced.

Mayor restored.

Recorder restored.

Aldermen restored.

Sheriff restored.

Vacancies to be filled
up.

A P P E N D I X.

Common-council to be convened.	manper and form as the aldermen, sheriffs, and citizens, of the said city of Chester, in the common-council of the said city, at or before the time of rendering the said judgment, were elected.* And, likewise, that they cause the common-council of the said city to be convoked and assembled to frame laws, and to do all other things which the common-council were accustomed or had power to do before the rendering of the said judgment. And also, that they cause the citizens of the said city to be assembled in the Common-hall, in the said city, to make elections and do all other things requisite and accustomed, and to be done in the usual manner. And, furthermore, we will and grant that the mayor, recorder, aldermen, sheriffs, and citizens, of the said city, being for the time the common-council, the citizens in the Common-hall assembled, and also the other officers of the said city shall do and execute all other such things, and shall have and exercise the same power, authority, and jurisdiction respectively, as the mayor, recorder, aldermen, common-council, or other officers respectively, were accustomed or had power to do, execute, or have respectively, before the time or times of rendering the aforesaid judgments, and in as ample manner and form as if no such judgments had ever been rendered. And that the said mayor and recorder of the same city, as also the sufficient deputy of the said recorder, for the time being (to which said recorder we, by these presents, give and grant full and sufficient power and authority to constitute and nominate his sufficient deputy or deputies to the office of recorder of the said city) and the aldermen who, before the rendering the said judgment, had been mayors of the said city, or who in future shall be mayors, or execute the office of mayor, shall be justices of the peace within the city of Chester aforesaid, and the places within the circuit and precinct of the said city, and also all places within the county of the said city of Chester, and perform the same things as justices assigned to keep the peace may do, in such and as ample manner and form as the mayor, recorder, and the other aldermen (as above-mentioned) were constituted justices of the peace, or assigned to keep the peace, before the time or times of rendering the aforesaid judgments, and to hold sessions of the peace, and to do all other things which in that behalf they had power and were accustomed to do. And we will and command, that the said mayor, recorder, and citizens, of the city of Chester aforesaid, do elect and cause to be elected, a new mayor, new sheriffs, and other new officers of the city aforesaid, on the day and days next following the date of these presents, in the manner and at the places accustomed before the time of rendering the said judgment in Hillary term, in the 35th and 36th years of the reign of the said late King Charles II. And that they cause the said new mayor, sheriffs, and other officers (being present) to take the oaths, and be admitted, in all things, according to the use and custom of the said city, before the time of rendering the said judgment. And furthermore, for us, our heirs, and successors, we grant and restore to the said mayor and citizens of Chester aforesaid, that they have and enjoy the sheriffalty of the city of Chester, as also the election and appointment of sheriffs of the same, as at the time of rendering the said judgment, or before, they held the same. Reserving, yielding,
Citizens to be assembled.	
Former powers regained.	
Deputy recorder.	
Justices of the peace reappointed.	
Antient days of election to be observed.	
Bailiwick of the city.	
Antient tenure.	

* This is one of the few clauses in this instrument of a *directory* nature, and is intended merely to serve the *present* exigence. All the usual modes of election it means to leave exactly as the judgment found them; and, therefore, can never be construed to legalize those which were in themselves unlawful.—See the opinion of the Lord Chief Baron, on the effect of this charter, p. 508.

A P P E N D I X.

ing, and paying, to us, our heirs, and successors, for all and singular the premises, all ancient dues, services, rents, and payments, at the time of the said judgment rendered due and payable, in the accustomed manner and form as they would have been due and paid if the judgments aforesaid had never been rendered. And furthermore, we grant and ordain, that the oath for the due execution of the offices of mayor, recorder, and his deputy, the aldermen and sheriffs of the city aforesaid, heretofore usually taken, shall be given and administered to the mayor, recorder, his deputy, the aldermen, and sheriff above-mentioned, in the manner following (videlicet) That the aforesaid recorder, or any of the said aldermen above-named, shall give and administer the usual oath of mayor, and the oath of aldermen of the said city, to the said William Streete. And that he the said William Streete, or any one of the said aldermen above-named, shall give and administer the usual oath of recorder of the said city, to the said recorder William Williams. And that the aforesaid mayor, recorder, or any one of the said aldermen above-named, shall give and administer the usual oaths to the aldermen above-named, to the sheriff, the said deputy recorder, and the other officers of the said city respectively. To which mayor, recorder, and aldermen above-named, we do, by these presents, give and grant full power and authority to administer the said respective oaths respectively. And that, for the future, the oaths shall be administered within the said city, to the respective officers and ministers of the said city, as in time past they were wont. And further, by these presents, we declare our royal pleasure and intention, that we, at any time hereafter, will grant, constitute, or make, any other charter, gift, act, matter, or matters, which shall be requisite or necessary, for the further confirmation of these our letters patent, or any thing or things in them contained, or for the better restoring to the aforesaid citizens the privileges, franchises, &c. intended to be restored by these letters patent, or for the increase of trade, or for good order within the said city, or for the advantage of the said city, or the citizens thereof. In witness whereof, &c. Given at Westminster, the 26th of October,

Manner of swearing
in the restored
officers.

Further indulgences
promised.

BY THE KING HIMSELF.

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